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Supreme Court of the United States

OCTOBER TERM, 1949

No. 337

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, CITY OF NEW OR-
LEANS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

FILED SEPTEMBER 21, 1949.

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, Plaintiff

v.

UNITED STATES OF AMERICA, Defendant

[File endorsement omitted]

COMPLAINT TO SET ASIDE IN PART AN ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed February 16, 1949

The Railway Labor Executives' Association, by its attorneys, brings this action against the defendant and complains and alleges as follows:

1. This action is brought pursuant to the provisions of Title 28, United States Code, sections 1336, 1398, 2321-2325, and 2284, to set aside, enjoin and annul, in part, an order of the Interstate Commerce Commission dated April 7, 1948, entered by Division 4 of said Commission in a proceeding entitled Finance Docket No. 15920, *New Orleans Union Passenger Terminal Case*. A copy of said order and the accompanying report made a part thereof are attached hereto as Exhibit A.

2. The jurisdiction and venue of this Court is established by the above cited provisions of Title 28, United States Code, which include the requirement of a three judge court to hear and determine the action.

3. The Railway Labor Executives' Association, plaintiff herein, is a voluntary unincorporated association with which are affiliated the following standard international railway labor organizations:

Brotherhood of Locomotive Firemen & Enginemen.
Order of Railway Conductors of America.
Switchmen's Union of North America.
The Order of Railroad Telegraphers.
American Train Dispatchers' Association.
Railway Employes' Department, A. F. of L.
[fol. 2] International Association of Machinists.

International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America.

International Brotherhood of Blacksmiths, Drop Forgers and Helpers.

Sheet Metal Workers' International Association.

International Brotherhood of Electrical Workers.

Brotherhood of Railway Carmen of America.

International Brotherhood of Firemen & Oilers.

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes.

Brotherhood of Maintenance of Way Employes.

Brotherhood of Railroad Signalmen of America.

National Organization of Masters, Mates & Pilots of America.

National Marine Engineers' Beneficial Association.

International Longshoremen's Association.

Hotel & Restaurant Employees' and Bartenders International Union.

Railroad Yardmasters of America.

4. Certain of the foregoing organizations are the collective bargaining representatives for employees of the common carriers by railroad affected by the Commission's order herein sought to be enjoined in part, and have agreements with said carriers concerning rates of pay, rules and working conditions of such employees. Said agreements confer upon the said employees valuable property rights in relation to their employment. By virtue of the foregoing, plaintiff represents the interests of said employees; and this action is brought on their behalf.

5. Plaintiff's principal place of business is located in the District of Columbia at 10 Independence Avenue, S. W., Washington, D. C.

6. The United States of America is made the defendant herein pursuant to the provisions of section 2322 of Title 28, United States Code.

7. On November 21, 1947, the City of New Orleans, Louisiana, which through the agency of its Public Belt Railroad Commission, owns and operates a belt line railroad, together with certain common carriers by railroad filed a joint application with the Interstate Commerce Com- [fol. 3] mission for authority to construct and acquire

certain lines of railroad, to jointly own or use lines of railroad, and to abandon certain other lines or operations on such lines—all as necessary incidents to the construction of a new railroad passenger terminal at New Orleans and the removal within that city of certain trackage for the purpose of eliminating undesired grade crossings. The Commission's approval was also sought for the issue by the City of New Orleans of $15,000,000 in revenue bonds to partly finance the program. The full history and nature of the project, including the details of the various agreements effected for its consummation by the several railroad carriers and the City of New Orleans, are not material to the Commission's action herein alleged as unlawful, but such information is provided in the Commission's report (267 I.C.C. 763) here attached together with its order as Exhibit A.

8. The Railway Labor Executives' Association, plaintiff herein, was permitted to intervene and did intervene in the proceeding before the Commission as the representative of the interests of the employees of the railroad carriers involved. Such intervention was for the purpose of urging the Commission to provide, in any order authorizing the proposed transactions, a fair and equitable arrangement for the protection of railroad employees affected, as required by Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f).

9. After hearing, Division 4 of the Commission on April 7, 1948, entered its report and order (Exhibit A) authorizing the proposed transactions with the exception of the proposed issuance of revenue bonds to the amount of $15,000,000, which was later authorized by Division 4 in a supplemental report and order dated May 6, 1948 (267 I.C.C. 760).

10. The authorizations granted by the Commission's report and order of April 7, 1948, were made subject to certain conditions imposed for the protection of employees. These conditions were not specifically enumerated in the said report and order but were incorporated therein by reference to another Commission decision in the following language (Exhibit A, p. 14):

> "We are of opinion that a fair and equitable arrangement for protecting the interests of employees ad-

versely affected by the applicants' proposals here will be provided by conditions similar to conditions (4) to (9), inclusive, imposed by us in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (197-201) which are similar to those prescribed in *Chicago, B. & Q. R. Co., Abandonment, supra*, and our approval and authorization herein will be granted subject to those conditions."

[fol. 4] The conditions referred to in the above quoted excerpt are attached hereto as Exhibit B.

11. In the course of its report (Exhibit A, p. 14), the Commission found that since the record showed definitely that employees will be adversely affected by applicants' proposals, it is appropriate to require a fair and equitable arrangement to protect the interests of the employees so affected, and that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by the exercise of the authorizations granted. The Commission did not attempt to fix the exact number of employees who would be adversely affected but relied upon estimates that approximately 1022 employees would be affected by the transactions and that about 350 employees would lose their jobs (Exhibit A, p. 11). Plaintiff believes, and hereby alleges, as is disclosed by the Commission's report, that the transactions are of such a nature that their consummation will result in the displacement from their positions of approximately 350 railroad employees, but avers that the precise number of such employees and their identity is not capable of exact ascertainment.

12. The Commission further directed in its report and order that the said protective conditions should remain in effect only for a period of four years from the effective date of its order authorizing the transactions. Said effective date was fixed at 40 days after April 7, 1948 (Exhibit A, p. 20). The Commission concluded in its report that it had no authority to prescribe any other period (Exhibit A, p. 14).

13. On May 8, 1948, plaintiff herein petitioned the Commission to reopen the proceeding for reconsideration by the entire Commission, and upon such reconsideration to modify so much of the said report and order of Division 4

as concluded that the Commission was required by statute to limit the period of protection to four years from the effective date of its order.

14. In support of the petition for reconsideration and modification, attention was directed to the fact that the transactions approved by the Commission's order are of such magnitude that necessary financial arrangements and required construction work cannot be completed within a period of four years from the effective date of the Commission's order. The applicants in the proceeding before the Commission so represented and the Commission so [fol. 5] found by fixing a completion date for the construction authorized as of December 31, 1953, and providing that no abandonment of lines or operation would be permitted until such construction was completed (Exhibit A, p. 14). In the face of such determination, it was contended by plaintiff herein that modification of the limitation of the protective period to four years from the effective date of the order was required since otherwise no protection would be provided because such period would expire before the employees were affected. The completion of the project has been further delayed by events occur-ing since the date of the Commission's original order. On November 10, 1948, applicants petitioned the Commission to extend the authorized time for commencement of construction and time for completion to December 31, 1949, and December 31, 1954, respectively, on the ground that the issuance of bonds by which the project is to be financed has been delayed by litigation not yet terminated. By order dated November 22, 1948, the Commission extended the time for commencement and completion of construction as requested, stating as the basis for such extension that it appeared that for good cause shown applicants would be unable to commence or complete the construction within the time prescribed by the original order. Copies of the application for extension and the Commission's order of November 22, 1948, are attached hereto as Exhibits C and D, respectively.

15. It was further contended by plaintiff in its petition for reconsideration and modification that the Commission's construction of Section 5(2)(f) of the Interstate Commerce Act as affording it no authority to prescribe a period of protection other than one limited to four years from the

effective date of its order erroneously attributes an intention to Congress to afford no protection whatever to employees adversely affected by projects whose completion and attendant adverse effects occur subsequent to four years from the date of their authorization by the Commission. Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C § 5(2)(f)) reads in part as follows:

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during [fol. 6] which such employee was in the employ of such carrier or carriers prior to the effective date of such order . . ."

Plaintiff contended in its said petition for reconsideration and modification that the second sentence of the said section above quoted, if properly interpreted, establishes a minimum standard of protection of a specific type, i.e., the imposition of conditions which will insure employees not being placed in a worse position with respect to their employment during the said four year period; that said sentence was not intended to nullify the preceding general provision of the section requiring the Commission to provide a fair and equitable arrangement to protect the interests of employees; and that the section as a whole vests in the Commission and imposes upon it the duty, in providing the required fair and equitable arrangement, to extend said protection for such time as may be necessary to accomplish the basic purpose of the statutory provision. The Commission, however, in its report interpreted the time limitation contained in the second sentence of Section 5(2)(f) as limiting its power

to provide employee protection of any kind to a period of four years from the effective date of its order (Exhibit A, p. 14).

16. On May 13, 1948, Division 4 of the Commission ordered the proceeding reopened for reconsideration of the issue submitted by the Railway Labor Executives' Association. On July 6, 1948, the full Commission denied the petition for reconsideration. A copy of the Commission's order of July 6, 1948, is attached hereto as Exhibit E.

17. That portion of the Commission's said order of April 7, 1948, which restricts the period of employee protection to four years from the effective date of said order is illegal and void for the following reasons:

(a) It erroneously interp-ets Section 5(2)(f) of the Interstate Commerce Act as requiring the Commission to limit all protection of employees adversely affected by transactions authorized under Section 5(2) to a period of four years following the effective date of the Commission's order of authorization irrespective of when the adverse effect occurs and whether it occurs within said period of four years;

(b) It fails to comply with the requirement of Section 5(2)(f) of the Interstate Commerce Act that as a condition to its approval of transactions under Section 5(2) the Commission shall provide a fair and equitable arrangement to [fol. 7] protect the interests of the railroad employees affected. Said order of the Commission provides no protection whatever to employees who will be adversely affected by authorized transactions which will not be completed until after the protective period prescribed by the order has expired;

(c) It represents an undue and erroneous restriction by the Commission as to the scope of power vested in it and duties imposed on it by statute, which restriction produces unfair and inequitable results contrary to the intent of Congress in Section 5(2)(f) of the Interstate Commerce Act;

(d) It erroneously interprets the several provisions of Section 5(2)(f) of the Interstate Commerce Act collectively in such manner as to completely nullify one of the specific provisions thereof;

(e) It erroneously construes the second provision of Section 5(2)(f), which is a minimum standard of protection directed specifically to employees not being placed in a "worse position with respect to their employment" during the four year period following the effective date of the Commission's order, as nullifying the first provision of Section 5(2)(f), which requires the Commission to provide, without limitations in point of time, a fair and equitable arrangement for the protection of the interests of the employees adversely affected;

(f) It is not supported by adequate findings. The ultimate or statutory finding that a fair and equitable arrangement for protecting the interests of employees adversely affected by the applicants' proposals will be provided by the conditions specified in the Commission's report is not supported by adequate basic findings and is, in fact, refuted by such subsidiary or basic findings as are contained in the Commission's report.

18. The report and order of the Commission, in the particulars above mentioned, are based on an erroneous, improper, and illegal interpretation and construction of the Interstate Commerce Act, as amended, and are not based upon adequate findings, contrary to the requirements of the statute and in excess of the Commission's statutory powers.

19. Plaintiff and the employees concerned represented by it are thus threatened with irreparable injury on account of the erroneous and unlawful construction placed by the Commission on Section 5(2)(f) of the Interstate Commerce Act in that they are subject to loss of employment, compensation, rights of seniority, and other valuable property rights [fol. 8] without the protection provided by law if the said portion of the Commission's order is allowed to stand. Plaintiff has fully pursued its administrative remedy before the Commission to the extent of applying for reconsideration and modification of the said report and order, which has been refused. Plaintiff and those represented by it have no remedy in the premises at law, by action for damages or otherwise, save by complaint to this Court pursuant to the provisions of the Judicial Code as aforestated.

Wherefore, plaintiff respectfully demands:

First: That, as provided by Section 2284 of Title 28, United States Code, upon the filing of this bill of complaint

the judge to whom it is presented shall notify the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit to designate two other judges, at least one of whom shall be a circuit judge, to serve with the said district judge as a three judge court to hear and determine the action.

Second: That process issue against the defendant, the United States of America; that service of a copy of the complaint be made on the Attorney General of the United States, the United States Attorney for the District of Columbia, and the Interstate Commerce Commission; and that after answer by the defendant and after not less than five days notice to the parties the application herein be given precedence and assigned for hearing at the earliest practicable day as provided by Section 2284 of Title 28, United States Code.

Third: That upon hearing of this action, judgment issue setting aside and annuling as unlawful and void that part of the Commission's report and order of April 7, 1948 which holds that the Commission lacks statutory authority, in providing an equitable arrangement for the protection of employee interests adversely affected, to extend the period of protection beyond four years from the effective date of said order; and directing the Commission to take such action as will provide a fair and equitable arrangement for employee protection consistent with the basic statutory purpose and compatible with the requirements of this case.

[fol. 9] Fourth: That plaintiff be given such other, further, general, and different relief as the nature of the case may require and as the Court may deem proper in the premises.

Dated: February 16, 1949.

Frank L. Mulholland, Clarence M. Mulholland, Willard M. McEwen, 741 Nicholas Building, Toledo 4, Ohio; Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C., ST-5366; Attorneys for plaintiff.

Of Counsel: Mulholland, Robie, McEwen & Hickey, 620 Tower Building, Washington 5, D. C.

[fol. 10] Secretary's Certificate to following papers omitted in printing.

[fol. 11] EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

Finance Docket No. 15920

New Orleans Union Passenger Terminal Case

Submitted March 19, 1948. Decided April 7, 1948

1. Certificate and order issued authorizing construction of lines of railroad and acquisition of lines of railroad, permitting abandonment, or abandonment of operation, of lines of railroad, and authorizing and approving joint use or joint ownership of lines of railroad in Orleans and Jefferson Parishes, La., by the City of New Orleans, La., the Chicago, St. Louis & New Orleans Railroad Company, the Gulf, Mobile & Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana & Arkansas Railway Company, the Louisville & Nashville Railroad Company, Guy A. Thompson, trustee of the Missouri Pacific Railroad Company, the New Orleans & Northeastern Railroad Company, the New Orleans Terminal Company, the Texas & New Orleans Railroad Company, The Texas & Pacific Railway Company, and the Texas Pacific-Missouri Pacific Railroad of New Orleans, incident to the construction and operation of a union passenger terminal in New Orleans, La. Conditions prescribed.

2. Action in respect of the issue of $15,000,000 of City of New Orleans Union Passenger Terminal revenue bonds deferred.

Henry G. McCall, Michel Provosty, Francis P. Burns, Robert E. Quirk, Lucien M. Abbot, Stanfield Johnson, Harry McCall, Harold E. Spencer, Henry L. Walker, Charles A. Helsell, Leonard B. Levy, J. T. Suggs, and Walter J. Suthon, Jr., for applicants.

Louis A. Schwartz and E. B. McKinney for intervener supporting application.

C. M. Mulholland for intervener representing railway employees.

C. L. Mulholland, L. J. Hoppe, R. L. Hickman, and August B. Russo for other railway labor organizations, protestants.

Report of the Commission

Division 4, Commissioners Mahaffie, Miller, and Mitchell

By Division 4:

The city of New Orleans, La., the Chicago, St. Louis and New Orleans Railroad Company, the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana & Arkansas Railway Company, the Louisville and Nashville Railroad Company, Guy A. Thompson, trustee in reorganization proceedings of the Missouri Pacific Railroad Company; debtor, the New Orleans and Northeastern Railroad Company, the New Orleans Terminal Company, the Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans (a Louisiana corporation), hereinafter sometimes referred to, respectively, as the city, the Chicago company, the Gulf company, the Illinois Central, the Louisiana company, the Louisville & Nashville, the Missouri Pacific or the Missouri Pacific trustee, the Northeastern, the terminal company, the Texas company, the Texas & Pacific, and the TP-MP Railroad, on November 21, 1947, filed a joint application for (1) authority for the construction or acquisition of certain lines of railroad, and [fol. 12] permission for abandonment, or abandonment of operation, of certain lines of railroad; (2) authority under section 5 (2) of the Interstate Commerce Act, as amended, for joint use or ownership of certain lines of railroad, in Orleans and Jefferson Parishes, La., as more particularly described in the appendix to this report, incident to the construction and operation of a union passenger terminal in New Orleans, La.; and (3) authority for the issue by the city of $15,000,000 of City of New Orleans Union Passenger Terminal revenue bonds. The Railway Labor Executives' Association intervened. A hearing was held, at which the New Orleans Traffic and Transportation Bureau intervened in support of the application, and various railway labor organizations were represented. Briefs on the question of

protection to be accorded to carrier employees adversely affected by the applicants' proposals were filed. No representations have been made by State authorities, and no objection to granting the application has been presented. Service of an examiner's proposed report was waived.

Purpose of Proposals

New Orleans now has five principal stations, in scattered locations, used for railroad passenger business, and many of its streets and highways are crossed by railroad tracks at grade. The applicants' proposals are presented in furtherance of a project for a union passenger terminal to be used by all the railroads serving the city and, closely related thereto, for improvement of the city's highway and rail traffic situation by elimination of grade crossings through separation of grades, track and yard removal or relocation, closing of streets, and limitation of use of certain trackage. As the project has been planned, the abandonment of rail routes, rerouting of rail traffic, and coordination of railroad passenger facilities contemplated are necessary to permit the project to be executed successfully. If the program should fail of consummation, the city will have to take steps to accomplish similar results by other means.

The City and Certain Other Applicants

The city is a municipal corporation of the State of Louisiana that owns and operates, through the agency of the Public Belt Railroad Commission, a belt line railroad, and has heretofore been authorized by us to issue securities, *New Orleans Public Belt R. Bridge Bonds*, 189 I. C. C. 156.

The Chicago company is a wholly owned subsidiary of the Illinois Central, and its properties are leased to that company. The Southern Railway Company owns all the stock of the Northeastern and the terminal company. The Missouri Pacific owns all of the Texas & Pacific's noncumulative 5-percent preferred stock and a majority of its common stock, and the Missouri Pacific and the Texas & Pacific own, in equal shares, all of the stock of the TP-MP Railroad, a terminal switching carrier that handles all the passenger and freight traffic of the proprietary companies moving to, from or through New Orleans, as well as a substantial volume of switching for its own account.

New Orleans

New Orleans is an important seaport and the terminus of 7 trunkline railroads. Its corporate limits coincide with the boundaries of Orleans Parish, extending on both sides of the Mississippi River and embracing an area of about 365 square miles. The city has an urban population of between 550,000 and 575,000, and about 105,000 people reside in its suburbs.

Grade Crossings

The terminal and grades separation project is concerned principally with the major section of the city east of the river, which covers an area of about 345 square miles and contains about 95 percent of the city's population. Within [fol. 13] this area are located a total of approximately 334 miles of main, yard, and industrial railroad tracks. Exclusive of the area along the water front, there are at present 144 street and highway crossings at grade over railroad tracks in Orleans Parish. The Downman Road underpass, on the Northeastern, is the only structure now in operation east of the river having the sole function of separating railroad and vehicular traffic. A primary objective of the project is to eliminate as many railroad tracks as possible through the heart of the city by concentrating operations on a minimum number of lines. The removal of railroad tracks under the program will completely eliminate 33 grade crossings. Underpasses or overpasses are to be provided at 27 crossings, and 23 minor crossings are to be closed. However, 2 new grade crossings will be added, so that 63 crossings will remain, but in nearly all instances the railroad traffic thereover will be light and the interference with highway traffic will be negligible. The area east of the river is served by the freight and passenger trains of 8 trunk-line railroads.

Railroads

The three principal railroad approaches to the New Orleans are, from the east, the Northeastern, the Gulf company, which operates over the line of the Northeastern, and the Louisville & Nashville; from the west, the Illinois Central and the Louisiana company; and from the southwest, the Texas & Pacific, the Missouri Pacific, and the Texas company.

Two principal belt lines connect the railroads approaching from the east with those approaching from the west and southwest. These are the terminal company's outer belt, extending from East Bridge Junction to Port Chalmette, and the Public Belt Railroad, extending from West Bridge Junction, west of the river, across the Mississippi River Bridge and thence along the east bank river front and the upper side of the Industrial Canal, making direct interchange connections, with all New Orleans rail lines.

Passenger Stations

The five passenger stations within the city are the so-called Union Station, at South Rampart Street between Howard and Calliope Streets, owned by the Chicago company, and leased to the Illinois Central, which is used for the business of the Illinois Central and the Texas company; the Terminal Station, at Canal and Basin Streets, owned by the terminal company, and used for the business of the Northeastern and the Gulf company; the Louisville & Nashville's station, at the foot of Canal Street; the Louisiana company's station, at South Rampart and Girod Streets; and the TP-MP station, on Annunciation Street, between Melpomene and Thalia Streets, owned by the TP-MP Railroad, and used for the business of the Texas Pacific and the Missouri Pacific. Operation of some of these stations, of the stub-end type, is hampered by short station tracks or street crossings, and at others operation is difficult or inconvenient because the facility is inadequate for the present volume of traffic or other reasons. Distances between the stations, as much as 1.5 miles, cause difficulties and annoyance in the transfer of passengers, baggage, mail, and express. Practically no through-car service is operated. In addition to the above, two small suburban stations, located about three bocks apart on South Carrollton Avenue, on tracks of the Illinois Central, are used by that carrier and the Texas company.

The union passenger terminal project contemplates abandonment of use of the present passenger stations.

History of Project

The city has been endeavoring to secure improvement of its railroad terminal situation since 1882, and during the past 30 years much effort has been exerted in the prepara-

tion of engineering studies and reports, and in extensive [fol. 14] negotiations between public authorities and the railroads. Heretofore little progress has been made, due principally to inability of the city and the railroads to agree upon a comprehensive program of grade-crossing elimination and terminal development. Unfavorable natural conditions also have been a major factor. New Orleans is located on a strip of flat, low-lying land between the river and Lake Pontchartrain and, because only a few feet difference exists in ground surface elevations, any grade separation requires extremely long approaches. Drainage and adverse foundation conditions also complicate the problem and increase the costs involved.

Further studies and negotiations in 1938 and 1939 resulted in a program for a single union passenger terminal for all roads at North Carrollton Avenue and Bienville Street, and extensive grade-crossing elimination, to be financed under the provisions of Act 385 of 1938, of the Louisiana Legislature, with the assistance of the Public Works Administration, but emergency conditions preceding World War II prevented consummation of this plan.

Upon its adoption by the electorate at a general election on November 8, 1938, Act 385 became an amendment of the State constitution. Among other things this act authorized the city to construct and operate one or more passenger terminals and to require the railroads serving New Orleans to use such facilities to the exclusion of their present facilities, but provision was made for a voluntary contract among the interested parties, if such an agreement could be negotiated. The act contemplated and authorized an improvement in highway traffic conditions involving grade separations and other measures as an integrated part of the program, and authorized the city to issue $15,000,000 of revenue bonds and use the proceeds for the acquisition and construction of one or more passenger terminals and for defraying portions of the cost of grade separations. Provision was made for loans from the proceeds of the bonds to the several railroads for use in revision of their own facilities in connection with the project, and for the manner in which the bonds are to be secured. Authorization was granted for the vesting in a committee, to be comprised as stated below, of certain powers and functions in respect to the provision and operation of the contemplated facilities.

Before resumption of negotiations after termination of the war, a somewhat new plan was conceived which involved the use of New Basin Canal [1] and Shell Road, owned by the State, as means of access for the railroads to a particular site. Act 405 of 1946, adopted as an amendment to the State constitution on November 5, 1946, authorized a contract whereby necessary portions of this property could be conveyed to the city for use as a part of the proposed union passenger terminal. This amendment required that any contract carrying out such authorization should be entered into not later than December 1, 1947, but not before a contract providing for construction of a passenger terminal had been executed.

Terminal Agreement

An ordinance of the city adopted on June 5, 1945, provided for the establishment of a Terminal Board to represent the city in negotiating with the railroads for the purpose of seeking a satisfactory solution of the terminal and grade-crossings problem. On March 16, 1946, the Terminal Board submitted its report, and this became the basis of negotiations that resulted in an agreement, known as the terminal agreement, which was executed on October 22, 1947, by all the applicants and by the Public Belt Railroad Commission. [fol. 15] This agreement contemplates the construction of a union passenger station on the site of the present so-called Union Station between Howard and Calliope Streets. This building is to face South Rampart Street, but will sit back about 400 feet therefrom, providing ample space for parking motor vehicles. Convenient access to this site for the public generally is considered vital to the success of the project. The new station will have 2 stories, 1 for passenger facilities and the other for offices. The station is to have 12 stub-end tracks served by 6 rail-height platforms, of which 4 will be protected by butterfly sheds of 13 car lengths, and 2 will have similar protection of 18 car lengths and 9 car lengths, respectively. Separate buildings for

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[1] Constructed 117 years ago to afford light draft navigation from Lake Pontchartrain into New Orleans. It is located in the uptown portion of the city and has constituted a barrier to adequate traffic facilities to an area west of the canal that has developed as the city has grown.

handling baggage and mail, certain shops, and service and store buildings are to be constructed and operated as a part of the terminal. Switching of trains and cars within the terminal will be performed by five 660-horsepower Diesel switching engines.

The two small suburban stations of the Illinois Central will be replaced by a small station at Carrollton Avenue, to be built at a cost of $86,000.

The project contemplates the acquisition for the purpose of the union passenger terminal of a portion of the New Basin Canal and Shell Road, property of the Chicago company, and certain property of the Louisiana company, certain areas owned by third persons, and certain street areas. The terminal agreement makes special provision for limited use of the terminal facilities by the Illinois Central and the Louisiana company in connection with their freight operations.

Train Operation

It is proposed that all passenger trains of the Northeastern and the Gulf company enter over the outer belt from Peoples Avenue and the Louisville & Nashville from a point near Elysian Fields Avenue, to a point between Canal Boulevard and New Basin Canal, where they will turn into a new double-track main line along the east side of the canal right-of-way to Carrollton Avenue. A double-track connection is to be built in the general vicinity of Southport Junction immediately west of the Orleans Parish line, between the Illinois Central and the Louisiana company's line. Texas & Pacific and Missouri Pacific passenger trains will proceed over the Public Belt Railroad, as at present, to a connection with the Illinois Central at East Bridge Junction, thence over the Illinois Central to Southport, connecting into the new line at that point. Illinois Central and Texas company trains will continue over the Illinois Central to Southport, making connection with the new line. Louisiana company trains will operate as at present, connecting with the union passenger terminal approach immediately east of the Jefferson-Orleans Parish line. All passenger trains of the western carriers will then proceed over the present Louisiana company route, which will be rebuilt and double-tracked as a part of the union passenger terminal, along the Airline Highway and across the present

location of the New Basin Canal to Carrollton Avenue, at which point they will connect with the eastern approach. All passenger trains will then proceed over a three-track approach, on the present right-of-way of the Louisiana company immediately east of the New Basin Canal, to approximately Dorgenois Street, at which point they will cross the proposed new highway in New Basis Canal on a wye track, proceed beyond South Broad Avenue, and back into the station. On out-bound movement, trains will proceed directly outward, crossing to the east side of the New Basin Canal right-of-way and proposed new highway at Dorgenois Street. The eastern lines' trains will proceed outward along the east bank of the canal to the outer belt. The western lines' trains will proceed along the Airline Highway to Jefferson Parish and thence to their respective lines.

Cost

It is now estimated that the total cost of the project, including the cost of street improvements, will be about $37,000,000. The cost of the union passenger terminal is estimated at about $15,765,000, divided as follows: Station [fol. 16] building proper, $1,800,000; land and property acquisition, together with damages to property, $3,321,000; track work, signal installation, equipment, facilities, and buildings, engineering and miscellaneous expense, $9,507,000; and payment of 15 percent of the cost of grade-separation structures within the terminal, $1,137,000. The 15 percent of the cost of grade-separation structures outside of the terminal, payable from the proceeds of the bonds, is estimated at $1,643,000. Also, $600,000 is to be advanced to the terminal company to enable it to double track part of its line, install certain signals, and do certain track work, made necessary by the changes incident to the primary purposes of the project.

The financing of the project, exclusive of the city's portion of grade-separation costs and its purchase of property for general purposes, is to be accomplished for the most part by the issue and sale of the proposed bonds. The proceeds of these bonds are to be available to pay the cost of constructing the union passenger terminal, to pay a part of the cost of grade separations as provided in the terminal agreement, and to provide the loan of $600,000 to the terminal company. Repayment of this loan, with in-

terest, will be included in the amounts available for interest and principal payments on the bonds.

The total of the sums above shown to be payable from the proceeds of the bonds is approximately $18,000,000, or $3,000,000, more than the total par value of the proposed bonds. Under the terminal agreement the railroad companies will be liable to pay this deficiency as prepaid additional rental. The remainder of the $37,000,000, or about $18,900,000, will be borne by the city with some assistance from other governmental agencies. The city has obligated itself to pay 85 percent of the grade separation program within and without the terminal proper.

The total cost is exclusive of certain additional costs to certain of the applicants, as the cost to the city of providing the Louisville & Nashville with a new route in exchange for property of that carrier in Elysian Fields Avenue desired by the city for highway purposes, the cost to the Illinois Central of relocating some of its displaced facilities, and the cost to the Northeastern of rearranging its Press Street yard.

Union Passenger Terminal

The proposed new terminal will be constructed and will be owned by the city, and will be operated for the city by the committee mentioned above, as a separate unincorporated entity to be known as the New Orleans Union Passenger Terminal. As such it will have its own employees, will keep its operations, accounts, and employment relationships separate and distinct from those of the Public Belt Railroad Commission and the railroad applicants, and will make its own separate reports to public authorities.

By the provisions of the terminal agreement, supervision and control of the acquisition, construction, maintenance, and operation of the terminal is vested in the committee, except that the Public Belt Railroad Commission has authority in certain particulars involving the station buildings proper, as specified in the agreement. The act of 1938 provided for the contingency that the city might act through the Public Belt Railroad Commission in many aspects of the project, with the proviso that certain functions might be vested instead in the committee. When exercising any right or power conferred by the act or performing any obligation imposed by the terminal agreement, the commission is indemnified by provisions of the agreement. Among

the undertakings of the commission are the making of a loan to the terminal company from the proceeds of the proposed bonds, and participation in the cost of construction and operation of a grade-separation structure. The committee consists of representatives of the city, (members of the Terminal Board of the Public Belt Railroad Commission) and representatives of the several railroads, and the terminal agreement provides for the manner in which they shall vote in determining the actions of the committee. The immediate operating head of the terminal will be the terminal manager, appointed by and reporting to the terminal committee.

[fol. 17]

Right of Use

The railroad signatories to the terminal agreement, and potentially any others that hereafter may serve New Orleans, by the agreement are granted the right to use [2] the terminal during an initial term of 50 years from the completion date,[3] with provision for extensions up to 50 years in addition, and the city undertakes to require, to the extent it lawfully may, use of the facilities on reasonable terms by any such railroad company, except that in the case of the Louisiana Southern Railway Company and the New Orleans & Lower Coast Railroad Company such power need not be exercised. It is estimated that the project can be completed in 4 or 5 years.

Rental

Under the agreement, the carriers have obligated themselves to pay as normal rent for use of the terminal, on a user basis, (1) the cost of maintaining and operating the terminal, and (2) interest on and serial maturities of the

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[2] Latent in the case of the Chicago company, a lessor company, and the terminal company, which is engaged principally in the movement of freight.

[3] Defined in the agreement as the date upon which the chief engineer, with the approval of the committee, shall certify that the terminal is sufficiently completed to be ready for use, and that the other facilities to be constructed under the agreement are sufficiently completed to permit the carriers to use the terminal without substantial interference with their operations.

proposed bonds, until January 1, 1998. Under Act 385, the terminal is to be exempt from ad valorem taxes. After the date mentioned, the carriers, in addition to paying all costs of maintenance and operation, are to pay to the city a net normal rental in an amount equal to what the ad valorem taxes would be on the terminal, on the basis of its fair value at that time as agreed upon by the city and the committee.

Other Provisions of Agreement

To the extent available, the bond proceeds will be applied ratably to all purposes they are intended to cover. Each carrier then will pay an equitable proportion of the prepaid additional rental required based on its use of each zone of the terminal and each grade separation and on the amount of prepaid rental allocated to each of such units. The normal rental for use of the publicly owned facilities prior to January 1, 1998, will be distributed among the carriers on the basis of the amount of bond proceeds expended on each terminal zone and grade separation on the same user basis, but normal rental applicable to grade separations on lines of an individual carrier will be paid entirely by it. All cost of maintenance and operation is to be paid by the carriers in each zone on a user basis, and each carrier is to pay for any special services chargeable to it.

No compensation is to be paid to members of the Terminal Board, the committee, or the Public Belt Railroad Commission, but the city is to be reimbursed for certain preliminary legal and engineering expenses. Working capital, in an amount not exceeding $300,000, will be advanced by the carriers on or before the completion date on the basis of specified percentages. If any additions and betterments to the terminal are needed, the city agrees to provide them and the carriers agree to furnish, as additional prepaid additional rental, sums sufficient to pay therefor. Proceeds from any retirements and sales of union terminal property are to be credited against normal rentals.

[fol. 18]

Bonds

The proposed bonds which will mature serially in varying amounts over a period of years, from January 1, 1953, through January 1, 1989, with a last maturity on January 1, 1998, will be offered for sale through competitive bidding,

but as the bonds have not as yet been so offered, the rate or rates of interest and other particulars have not yet been determined. Therefore, action with respect to the issue of bonds must necessarily be deferred.

Joint Tracks

With certain exceptions, tracks to be used jointly are included in the union passenger terminal, and compensation for such use is included in the normal rental payable under the terminal agreement.

As previously indicated, the Illinois Central and the Louisiana company are to have the right to use certain tracks of the union terminal in limited freight services. Under the terminal agreement, in consideration of the break in continuity of the lines of these parties which will result from construction of the terminal, certain tracks are to be constructed, without cost to them, for their joint and equal ownership. Under date of February 26, 1948, the Illinois Central and the Louisiana company entered into an agreement defining the use, operation, and maintenance of these tracks and certain other tracks owned solely by each of the parties for the purpose of handling its freight and switching business. The connecting track, together with use of facilities granted by the Louisiana company, will provide the means of access by the Illinois Central to its Poydras yard. The contract contains extensive provisions as to maintenance, renewal and repair, reciprocal grants of rights of use of facilities, by the Illinois Central to the Louisiana company, liability, arbitration of disputes and other matters, and provides that it shall become effective currently with construction of the facilities for which it provides, but the parties will be governed by applicable provisions thereof during the construction period.

In the terminal agreement, the terminal company agrees to enter into agreements with those carriers which are to use the union passenger terminal, providing that such carriers shall have the right to use such portions of the outer belt, for passenger service only, as may be necessary for them to reach the union passenger terminal. Such agreements are to become effective upon the expiration of present agreements which permit use of such facilities for passenger service and to remain in effect during the remainder

of the 50-year term of the terminal agreement, with the privilege of extending such use for further periods as the terminal agreement may be extended. In the event that the present agreement with the Gulf company for passenger service should terminate for any reason prior to January 1, 1953, it is agreed that until that date, that carrier will be permitted to use the outer belt, for passenger service, to reach the connection with the union terminal, upon the same terms and conditions as other users until January 1, 1953, and thereafter will be permitted such use upon the same terms as to valuation and other matters as other users for passenger service.

For the purpose of the terminal agreement, for the use of the outer belt after December 31, 1952, for passenger service it is understood that the base valuation to be used for rental is to be fixed by arriving at the cost of reproduction new, less depreciation, as of the date mentioned, but this base valuation is to be adjusted from time to time for subsequent net additions and betterments, and such original or adjusted valuation is to be subject to review at the end of each 10-year period during the life of the agreement for passenger service at the request of any party to an agreement dated May 17, 1909, between the terminal company and other parties. The interest rate upon the valuation is to be the interest rate provided in that agreement, namely, 5 percent annually.

[fol. 19] By an agreement dated March 17, 1948, the Northeastern grants to the Louisville & Nashville the right of joint use of (a) a track, partly in existence and in part to be constructed, from North Claiborne Street to Dauphine Street, (b) a track from Dauphine Street to Almonaster Avenue, (c) a track, existing and to be constructed from Dauphine Street to Mandeville Street, and (d) two cross-over tracks to be constructed in Peters Street that will connect (b) and (c); and the Louisville & Nashville grants to the Northeastern the right of joint use of a portion of the former's track extending from the present end of (c) to another connection.

The Louisville & Nashville agrees to construct a single track from the connection with its main line near the crossing of the Northeastern's main tracks at Peoples Avenue southward to a point of junction with that carrier's track described in (a), and the Northeastern agrees to grant a permanent easement for such portions of the new track as

may extend over and on its land or rights-of-way, for an agreed consideration of $18,152. But, if requested by the Northeastern, the Louisville & Nashville will relocate eastwardly a portion of this track, in which event, the Northeastern is to grant a right-of-way through its property for such relocation, and the Northeastern is to remove a storage track in order to permit construction of the Louisville & Nashville track. The Louisville & Nashville is not to have the right to switch any industries now or hereafter located on or adjacent to the tracks to be jointly used with the Northeastern or the track to be built by it.

The agreement contains further provisions as to construction and maintenance of crossings, details of operation, track maintenance, and use of the joint tracks by the terminal company as nominee of the Northeastern.

The Louisville & Nashville is obligated to pay to the Northeastern, on the date when it begins operation over the joint tracks, the sum of $21,276, or one-half of the agreed valuation, $42,552, of the tracks and facilities to be jointly used, excepting a portion of the track (a), of which the cost is to be assumed by the city, the cross-overs described in (d), and a designated portion of (c), and to pay, during the life of the agreement, one-half of the expense incurred by the Northeastern for maintenance and operation of such tracks and facilities, including a portion of track (a), and of the ad valorem taxes upon that property. In the computation of maintenance and operating expenses and charges, direct labor costs are to be increased by applicable pay-roll and similar taxes and allowances, and 10 per cent of labor charges for general supervision; and invoice prices of materials and supplies are to be increased by the applicable sales and other taxes, together with 15 percent of such prices for foreign-line freight charges on all materials and supplies, except ballast and coal. In the case of ballast, 60 cents a cubic yard is to be added to cover storage, inspection, accounting, and other expense; and freight at tariff rates is to be added in the case of coal. Other provision is made as to equipment used in connection with the work and assessments for public improvements, and for the deduction of 15 percent from the salvage credit value of material released to cover accounting, handling, and transportation. Depreciation is not to be included, and charges for maintenance and operation are to be credited with amounts collected by the Northeastern from third persons for rentals

or concessions granted in connection with the jointly used property.

The agreement contains other provisions as to equal sharing of the cost of additions and betterments and assessments for public improvements; but, if and when the overhead bridge at North Galvez Street is built, the Louisville & Nashville is to pay one-sixteenth of the railroad proportion of the entire structure, with approaches and land damage, estimated at $5,620, and the Northeastern is to pay fifteen-sixteenths or $84,300 on the basis of the number of tracks, respectively, which they have at that location. [fol. 20] Provision is also made as to adjustment between the parties of loss and damage claims, but the Northeastern is not to be answerable to the Louisville & Nashville, in any event, for service delay, interference, or interruption by damage or destruction of the jointly used facilities.

The effectiveness of the agreement is made contingent upon the terminal agreement becoming effective. The agreement is to become effective when the Louisville & Nashville begins use of the property and to continue in effect until terminated by mutual agreement, but the Louisville & Nashville may terminate it on 30 days' notice, if it discontinues operation over the facilities with the approval and consent of public authority having jurisdiction in the premises. Provision is also made for termination of the agreement by default. In the event of termination thereof by default or otherwise, the Louisville & Nashville agrees to remove its tracks and facilities from the property of the Northeastern and thereupon the easement for its tracks shall be extinguished, but the Louisville & Nashville will convey to the Northeastern a portion of its track (c) between specified points.

The Illinois Central and the Chicago company, its lessor, have entered into substantially similar agreements with the Texas & Pacific, Missouri Pacific trustee, and TP-MP Railroad, and with the Texas company covering use of its tracks between East Bridge Junction and Southport. The agreement with the Missouri Pacific group is dated November 15, 1947, and is to take effect when the union passenger terminal is completed and placed in operation, and to remain in effect for an initial period of 50 years. It grants the right of joint use, for operation of passenger equipment, of the Illinois Central's Southward main track between East Bridge Junction and the connection with the track of the

union terminal at Southport and northward main track between the connection with the main track of the terminal company at Shrewsbury and the above-mentioned connection at Southport, together with a cross-over track. As rental the grantees agree to pay a car-user proportion of 5 percent annually on agreed valuations, based on cost of reproduction new, less depreciation, of the jointly used tracks, and they agree to pay their user share of the expense of maintenance and operation, and taxes, computed as provided in the agreement. The agreement contains further provisions as to changes in the jointly used tracks, apportionment of special assessments, control of operation, liability, arbitration, default, and other matters usually included in such contracts. The grantees' use of the cross-over track is to be governed by a previous agreement dated May 15, 1937, whereby use of that facility was granted to others until July 1, 1953, but if use of the facility under that agreement should terminate for any reason, the grantees' use thereof is to continue subject to applicable provisions of the new agreement. The agreement with the Texas company is dated February 2, 1948. It contains similar provisions as to the contract dated May 15, 1937, mentioned above, but cancels an agreement dated December 18, 1902, under which the Texas company now uses the Illinois Central's tracks and facilities between East Bridge Junction and the Illinois Central's passenger station at New Orleans.

Public Interest

The union passenger terminal and grade-crossing elimination project will be mutually advantageous to the city and to the railroads serving New Orleans. The city will acquire valuable property from which it will receive a net rental equal to the ad valorem taxes on the facilities after rentals have paid the cost of construction, it will be benefited by substantial lessening of traffic hazards and expediting of highway traffic, its development will be facilitated and potential residential areas improved, and it will be able to effect these benefits at a cost less than it might otherwise have to bear.

The project is attractive to the railroads because their proportionate contribution to grade-separation costs is on a reasonable basis. The number of crossings requiring such separation is materially reduced, and they are relieved of

the burden of having to provide their part of such costs [fol. 21] from their own funds at one time, since their part of the costs is to be defrayed initially from the proposed bonds. They are also relieved from the necessity of considerable expenditures in the near future for their privately owned passenger station facilities.

Fixed Charges

We find that increase in total fixed charges resulting from the transactions herein within the scope of section 5 (2) of the act would not be contrary to the public interest. The transactions do not contemplate any guaranty or assumption of payment of dividends or fixed charges.

Employees

The total number of employees on the New Orleans lines that probably would be affected by the contemplated changes in operations has been estimated by a committee of transportation officers, on the basis of present day conditions, at 1,022, and the number required to operate and maintain the union passenger terminal has been estimated at 680. As provided in the terminal agreement, so far as feasible the terminal manager will recruit the necessary personnel from supervisory and other employees displaced at the 5 separate stations to be abandoned on completion of the union passenger terminal. The estimates indicate a net displacement of about 350 employees, of whom 9 are bridge tenders and about 108 are crossing watchmen now employed on tracks which will be retired or over which train and yard movements will be reduced; but the opinion is expressed that the number eventually displaced will not exceed 300.

The terminal agreement provides that, after the personnel of the union terminal has been recruited, all displaced employees shall receive compensation, if any is due, in the manner and to the extent that may be ordered by us; and further provides for defraying any costs of compensation of displaced employees as a proratable operating cost of the terminal except in the case of crossing watchmen, whose compensation, if any, is to be borne by the employing railroad.

The applicants do not deny, except as noted below, that some protection of employees adversely affected by the coordination of facilities and operations involved in the proj-

ect, is proper in the premises; but they disagree with the intervener representing employees as to the extent, in time, of the protection to be afforded and as to the classes of employees entitled to receive such protection. The intervener contends that whatever protection is afforded by us should continue for a period of at least 4 years from the time employees are adversely affected, and that such protection should extend to all employees so affected. These issues arise, as to the period of protection, from the applicants' estimate that physical consummation of the project will require 4 or 5 years and, as to the classes of employees to be included, from the applicants' contention that crossing watchmen and bridge tenders should not be included because such employees will lose their employment, not because of coordination of facilities and operation, but because of elimination of grade crossings, or as a result of filling in New Basin Canal, in the exercise of the city's police power.

The intervener takes the position that the applicants' proposals are for a coordination of carrier facilities within the meaning of the Washington Job Protection Agreement, and that employees adversely affected thereby are entitled to the protective measures specified in that agreement as a matter of contract right. These are questions within the jurisdiction of a private tribunal set up by the agreement, and the employees contemplate the institution of a proceeding before that body to determine whether those affected by the coordination are protected by the agreement. This is mentioned in order to make clear that the intervener's participation in this proceeding is not to be construed as a waiver of rights or in prejudice of any claim of right under [fol. 22] the agreement; and the intervener feels that it may here ask, with propriety, that a "protective floor" be established for employees pursuit to the provisions of section 5 (2) (f) of the Interstate Commerce Act and the discretion thereby vested in us.

The provision of the statute to which the intervener refers is as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall

include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The intervener observes that it has been our practice to impose, in determinations under section 5 (2), the conditions prescribed by us in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672. Those conditions follow the language of the second sentence of section 5 (2) (f) and now are imposed uniformly (1) in cases where it is definitely shown that no employees would be affected, and (2) in cases in which it is not definitely shown that employees would not be affected. The intervener states that such conditions are unsatisfactory in this case, contending that, inasmuch as the applicants' proposals will require 4 or 5 years for completion after any order of approval is issued, limitation of the protective period to 4 years from the effective date of the order would effectively nullify such conditions, as such period would expire before employees were affected.

Incidentally the intervener refers to testimony to the effect that, because of increased business, the railroads have added a substantial number of employees to their pay rolls in recent years, that any displaced employees will be those at the bottom of seniority lists and will have less basis for claims for protection than employees having longer period of service, and that it was the older employees which section 5 (2) (f) is intended to protect; and points out that the final clause in the second sentence of that provision shows the intention of Congress to provide protection for employees having less than 4 years of service. Furthermore, the

intervener urges, it is possible that business may decline and decreases in personnel occur so that, when the applicants' proposals are completed, the employees affected may be those having long employment with the railroads. Admittedly it is impossible at this time to determine the employees who will be released from service or otherwise affected adversely when the project is completed, although by comparison of seniority lists and the number of jobs affected, an employee could obtain some idea whether his employment would be placed in jeopardy, assuming no change in general conditions.

The intervener urges that the intention of section 5 (2) (f) is to provide a period of readjustment for employees adversely affected, and that no such period is afforded by merely serving notice now that a specified number of employees, without any identification, will be no longer needed 4 or 5 years hence. It therefore maintains that the purpose of the statute can be served only by dating any protective measures from the time when adverse effects of the project on employees become manifest, and that its proposal that employees receive protection for 4 years after completion [fol. 23] of the project and after the date of adverse effect on them is not contrary to the provisions of section 5 (2) (f), which, the intervener submits, establishes the minimum, and not the maximum, period of protection.

In this connection the intervener refers to our determination in *Chicago, M., St. P. & P. R. Co. Trustees Construction,* 257 I.C.C. 292, wherein the Commission denied a petition for extension of the date of commencement of the protective period for adversely affected employees, saying

> • • • Section 5 (2) (f) prescribed a definite period of protection, namely, "four years from the effective date of such order." In our opinion, we have no authority to prescribe any other period in a case arising under section 5 (2).

The intervener contends that conclusion should be reconsidered, pointing out that in *Chicago, R. I. & G. Ry. Co. Trustees Lease,* 230 I.C.C. 181 and 233 I.C.C. 21, decided prior to the enactment of section 5 (2) (f), we approved and authorized a lease subject to certain conditions for the protection of employees, with the period of protection to run

from the time when operation under the lease was to begin.[4] It argues that, while section 5 (2) (f) makes employee protection mandatory, rather than discretionary, as before, there was no intention thereby to decrease the measure of protection theretofore available.

Finally, the intervener undertakes to distinguish, in scope, the general directive in the first sentecnce of section 5 (2) (f) from the specification, in the following sentence, of the terms and conditions which we are to include in our orders under section 5 (2), contending that the general directive and the specification of terms and conditions are of equal weight, and that if the specification is considered as fixing the maximum period of protection, the general provision is nullified. It urges that an arrangement cannot be considered fair and equitable protection to employees when its effect would be to deprive them of all protection.

The railroad applicants anticipate that, insofar as appropriate, we will follow our practice of prescribing conditions for the protection of employees in cases under section 5 (2) in which it is not possible to determine at the time of our decision whether any employees will be affected, as in *Chicago & N. W. Ry. Co. Merger, supra;* but urge the propriety of following the pattern of the conditions prescribed in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700, in setting out in detail not only the rights and responsibilities of employees, but also the rights of the railroads, rather than the more general conditions prescribed in the determination first mentioned. They urge that the employing carriers are entitled to all such equitable protection as is afforded in the so-called Burlington conditions, because the project is a development compelled by the power of public authority in the public interest, and is not dictated by expediency in the hope of profit.

As to the extent to which employee protection should be afforded either under section 5 (2) (f) or under section 1 (20) of the act, the railroad applicants submit that it is wholly inappropriate to include crossing watchmen or bridge tenders for the reasons above indicated. They ask that we find that the loss of employment by those employees will not be the result of coordination of rail facilities and

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[4] Sustained in *United States* v. *Lowden,* 308 U. S. 225, decided December 4, 1939.

operations, but of the highway traffic improvement program engrafted on the union terminal project. But the interveners point out that the project is presented as an inseparable unit, that a general rerouting of railroad traffic is proposed, that by this means traffic over existing grade crossings will be eliminated or lessened, that the plan involves elimination of the crossing watchmen's jobs, and that, inasmuch as the plan is to be consummated by coordination of railroad facilities and operation, employee protection under section 5 (2) (f) is required. We imposed conditions under [fol. 24] section 5 (2) (f) for the protection of employees adversely affected by a proposed abandonment, because abandonment and construction were component parts of an inseparable plan of operation, in *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285.

Our authority to impose conditions for the protection of employees in abandonment proceedings is discretionary, but imposition of such conditions in proceedings under section 5 (2) is mandatory. In this proceeding the proposals to abandon and the proposals within the scope of section 5 (2) are inseparable parts of a general plan for coordination of operation. Accordingly, we think that the conditions to be imposed by us herein should conform to the requirements of section 5 (2) (f).

As the record shows definitely that employees will be affected adversely by the applicants' proposals, it is appropriate in this case that we require a fair and equitable arrangement to protect the interests of employees so affected. We think that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorizations herein granted. But we also think that the fair and equitable arrangement contemplated by section 5 (2) (f) is measured by the specification therein of a protective period of 4 years from the effective date of our order approving a transaction within the scope of section 5 (2). As was decided in *Chicago, M., St. P. & P. R. Co. Trustees Construction, supra*, we have no authority to prescribe any other period.

We are of opinion that a fair and equitable arrangement for protecting the interests of employees adversely affected by the applicants' proposals here will be provided by conditions similar to conditions (4) to (9), inclusive, imposed by us in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C.

177 (197-201) which are similar to those prescribed in *Chicago, B. & Q. R. Co., abandonment, supra,* and our approval and authorization herein will be granted subject to those conditions.

We find that the present and future public convenience and necessity require construction of lines of railroad and acquisition of lines of railroad, and permit abandonment, or abandonment of operation, of lines of railroad, in Orleans and Jefferson Parishes, La., by the city of New Orleans, La., the Chicago, St. Louis and New Orleans Railroad Company, the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana & Arkansas Railway Company, the Louisville and Nashville Railroad Company, the New Orleans and Northeastern Railroad Company, the New Orleans Terminal Company, and the Texas and New Orleans Railroad Company, as described in the appendix to this report; and, subject to the conditions for the protection of employees referred to herein, that acquisition of the right of joint use or joint ownership of line of railroad, described in said appendix, by the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana & Arkansas Railway Company, the Louisville and Nashville Railroad Company, Guy A. Thompson, trustee of the Missouri Pacific Railroad Company, the New Orleans and Northeastern Railroad Company, the Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans is, in each instance, a transaction within the scope of section 5 (2) of the Interstate Commerce Act, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest.

An appropriate certificate and order will be entered, effective from and after 40 days from its date, requiring that the construction authorized shall be commenced on or before December 31, 1948, and completed on or before December 31, 1953, and providing that none of the lines or operations herein permitted to be abandoned, may be abandoned until operation is substituted over lines herein authorized to be constructed or jointly used. Suitable provision will be made therein for the cancellation of tariffs. Our determinations herein contemplate that before recording on its books the related journal entries to show retirement of lines from

service, each applicant therein granted permission to abandon first shall submit the entries for our approval.

[fol. 25] APPENDIX

Specific authorization sought

I. Under Section 1 (18) of the Interstate Commerce Act.

A. To construct lines of railroad—

1. By the city. (a) A double track commencing in the vicinity of East City switch on the line of the terminal company, known as the outer belt at Woodlawn Place to the junction with the western connection of the union passenger terminal in the vicinity of South Carrollton Avenue, a distance of approximately 8,800 feet. (b) A double track from the vicinity of Southport Junction on the Illinois Central to the connection of said tracks with the present Louisiana & Arkansas main-line track in the vicinity of the Orleans-Jefferson Parish line between Forshey and Olive Streets adjoining the Airline Highway, a distance of approximately 3,500 feet on one track and approximately 2,700 feet on the other.[5] (c) Three tracks from the junction of the eastern and western approaches of the union passenger terminal near Solomon Street in the vicinity of Carrollton Avenue to the vicinity of South Dorgenois Street, a distance of approximately 6,400 feet. (d) A double-track loop track from South Dorgenois Street to a connection with the Illinois Central's track near South Gayoso Street, a distance of approximately 3,400 feet. (e) A single track (in-bound main line) from said loop track in the vicinity of South Dorgenois Street to connection with the station throat in the vicinity of South Claiborne Avenue, a distance of approximately 3,400 feet. (f) A single track (out-bound main line) from the station throat in the vicinity of South Claiborne Avenue to South Dorgenois Street, a distance of approximately 3,400 feet. (g) A track from a point in the existing main-line tracks of the Louisville & Nashville, approximately 3,440 feet southwesterly from milepost 802, and

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[5] Difference in length of tracks is due to the distance between the Illinois Central main tracks at Southport Junction.

approximately 350 feet northeasterly from the crossing of said Louisville & Nashville tracks and the main tracks of the Northeastern near Peoples Avenue, thence in a southerly direction to a point approximately 80 feet north of the north line of North Claiborne Street, a distance of approximately 8,880 feet.[6] (h) Approximately 80 feet of the track between Mandeville Street and Esplanade Avenue, which is to be acquired by the Louisville & Nashville.[7]

2. By the Louisiana company. Approximately 1,500 feet of new main-line track at a point near the Orleans-Jefferson Parish line.

3. By the Louisville & Nashville. Main-line tracks extending from a point in its existing main tracks approximately 2,696 feet southerly from milepost 803, thence in a southwestwardly direction to connections with the terminal company's tracks known as the outer belt, a distance of approximately 1,112 feet.

B. To acquire lines of railroad—

1. By the city. The single main-line track of the Louisiana company from a point near Livingstone Street to a connection near Carrollton Avenue with the tracks to be constructed by the union passenger terminal, a distance of approximately 5,200 feet.[8]

[fol. 26] 2. By the Louisville & Nashville. (a) A main track from a point in its existing main tracks, approximately 3,440 feet southwesterly from milepost 802, and approximately 350 feet northeasterly from the crossing of said existing main-line tracks and main tracks of the Northeastern near Peoples Avenue, thence in a southerly direction to a point approximately 80 feet north of the north line of North Claiborne Street, a distance of approximately 8,880 feet.[9] (b) A main track extending from a point between Mandeville and Marigny Streets to a connection with the Louis-

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[6] This track will be acquired, and be used exclusively, by the Louisville & Nashville.

[7] See I, B, 2, (b).

[8] To be abandoned by the Louisiana company. See I, C. 3.

[9] To be acquired from the city.

ville & Nashville's existing main track at or near Esplanade Avenue, a distance of approximately 850 feet.[10]

C. To abandon lines of railroad—

1. By the Chicago company. Main-line tracks from milepost 910.77 to milepost 912.18.

2. By the Illinois Central. Main-line tracks from milepost 451.92 to milepost 454.52.[11]

3. By the Louisiana company. Main-line tracks from a point near the Orleans-Jefferson Parish line to the south side of Carrollton Avenue, approximately 6,150 feet.[12]

4. By the Louisville & Nashville. Main-line tracks beginning at a point in existing main tracks approximately 2,696 feet southwesterly from milepost 803 and extending in a southwesterly direction to Elysian Fields Avenue, thence in a southerly direction in Elysian Fields Avenue to the foot of Esplanade Avenue, a distance of approximately 9,896 feet.

5. By the terminal Company. Double-track main tracks from the present passenger station of the terminal company on Canal Street to a point near Toulouse Street, a distance of approximately 1,200 feet.[13]

D. To abandon operation of lines of railroad—

1. By the Gulf company. Double-track main-line track of the terminal company from the East City Switch on the line of that company known as the outer belt at Woodlawn Place

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[10] Approximately 770 feet of this track belongs to the Texas company and is used by it as a way switching track; approximately 80 feet will be acquired from the city.

[11] It is proposed to remove the track from milepost 452.22 to milepost 452.83 and from milepost 454.31 to milepost 454.42, and to retain the remainder of the track to be abandoned for use as a switching and industrial track.

[12] To be sold to the city.

[13] Abandonment and sales of the station will render continuance of this track unnecessary.

to the present passenger station of the terminal company at Canal Street, a distance of approximately 19,357 feet.[14]

2. By the Illinois Central. Main tracks of the Chicago company from milepost 910.77 to milepost 912.18.

3. By the Louisiana company. Main-line tracks described in I, C, 3.

4. By the Louisville & Nashville. Main-line tracks described in I, C, 4.

5. By the Northeastern. Main-line tracks described in I, D, 1.

[fol. 27] 6. By the terminal company. Main-line track described above in I. C, 5.

7. By the Texas company. Double track of the Illinois Central from Southport, at which point the union passenger terminal tracks will connect with each of the two tracks of the Illinois Central to the present passenger station of the Illinois Central at Rampart Street, a distance of approximately 18,000 feet.[15]

II. Under section 5 (2) of the Interstate Commerce Act.

A. To acquire the right jointly to use lines owned by others—

1. By the Gulf company. (a) Double-track main-line tracks from the East City switch on the line of the terminal company known as the outer belt at Woodlawn Place to the junction of the western lines at Carrollton Avenue, a distance of approximately 8,800 feet;[16] thence (b) three main tracks to a point near South Broad Street, a distance of approximately 5,800 feet;[17] thence (c) a single track

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[14] In lieu thereof the Gulf company's passenger trains will operate into the new Union Passenger Terminal over track described below. See II, A, 1, (a).

[15] In lieu thereof, the Texas company's passenger trains will operate into the new union passenger terminal over tracks described below. See II, A, 7 (a).

[16] Jointly with the Northeastern and the Louisville & Nashville.

[17] Jointly with all the other railroads.

around a loop to the connection of the city's union passenger terminal tracks with the Illinois Central's tracks near South Gayoso Street, then to a connection with the station tracks of the union passenger terminal at Claiborne Avenue, a distance of approximately 7,100 feet.[17] (d) A single main track from the throat of the station tracks of the union passenger terminal to a connection at South Broad Street with the three main tracks described in (b) above, a distance of approximately 3,850 feet.[17]

2. By the Illinois Central. The tracks of the union passenger terminal from Southport Junction to the new station building.

3. By the Louisiana company. Tracks owned by the city extending from a point near the Jefferson-Orleans Parish line to a point south of Claiborne Avenue, chaining station 167 to chaining station 0 plus 00.

4. By the Louisville & Nashville. (a) Main tracks of the terminal company known as the outer belt extending from a point of connection of tracks to be constructed by the Louisville & Nashville to a point near Woodlawn Place, being the point of connection of the union passenger terminal tracks with the outer belt, a distance of approximately 18,575 feet.[18] (b) Main tracks of the city extending from a point of connection with main tracks of the terminal company near Woodlawn Place in a southerly and southeastern direction to the union passenger terminal, a distance of approximately 21,000 feet.[19] (c) Main tracks of the city extending from a point in main tracks at or near South Broad Street, thence, by loop, in a southerly and southwesterly direction to a connection with union passenger terminal tracks, near South Broad Street, a distance of approximately 1,450 feet, thence in a northwesterly direction to end of union passenger terminal tracks and a connection with Illinois Central tracks, near Gayoso Street, a distance of approximately 1,850 feet, and from the connection, at or near South Broad Street, in a southeasterly direction to a connection with the union passenger tracks, a distance of approximately 3,500 feet.[19] (d) A main track

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[18] To be used jointly with the Northeastern and the Gulf company.

[19] To be used jointly with other railroad applicants.

extending from a point approximately 80 feet north of the north line of North Claiborne Street to a point approximately 85 feet north of the north line of Marais Street, a distance of approximately 1,570 feet.[20] (e) A main track extending from a point 85 feet north of the north line of [fol. 28] Marais Street to a point 130 feet south of the south line of Dauphine Street, a distance of approximately 1,800 feet.[21] (f) A main track extending from a point 130 feet south of the south line of Dauphine Street to a point in or near Almonaster Avenue, where said track connects with the track of the Texas company, a distance of approximately 1,900 feet.[22] (g) A main track extending from a point near Almonaster Avenue, being the end of the track described above (f), to a point in the Louisville & Nashville's existing main track at or near Esplanade Avenue, a distance of approximately 1,540 feet.[23] (h) A main track extending from a point 130 feet south of the south line of Dauphine Street to a point between Mandeville and Marigny Streets, a distance of approximately 2,590 feet.[24]

5. By the Missouri Pacific. (a) The double main track of the Illinois Central from a connection between the New Orleans Public Belt track with the southward main track of the Illinois Central at East Bridge Junction to a connection between said main tracks of the Illinois Central and the tracks of the New Orleans union passenger terminal, when constructed, at or near Southport, a distance of approximately 2.18 miles. (b) The New Orleans union passenger terminal tracks from the point of connection with the main tracks of the Illinois Central at or near Southport to the union passenger station, when constructed, near the present location of the Illinois Central passenger sta-

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[20] To be constructed by the city, owned by the Northeastern and used by it jointly with the Louisville & Nashville.

[21] Owned by the Northeastern and to be used by it jointly with the Louisville & Nashville.

[22] Owned by the Northeastern and to be used jointly by it, the Texas company, and the Louisville & Nashville.

[23] Owned by the Texas company and to be used jointly by it, the Northeastern, and the Louisville & Nashville.

[24] Owned by the Northeastern and to be used jointly by it, the Texas company, and the Louisville & Nashville.

tion at Loyola and Calliope Streets, a distance of approximately 3.92 miles.

6. By the Northeastern. (a) Double track from the East City switch on the line of the terminal company known as the outer belt at Woodlawn Place to the junction at the western lines at Carrollton Avenue, a distance of approximately 8,800 feet;[25] thence (b) three main tracks to a point near South Broad Street, a distance of approximately 5,800 feet;[26] thence (c) a double track around a loop to the connection of the city's union passenger terminal tracks with the Illinois Central's track near South Gayoso Street, then to a connection with the station tracks of the union passenger terminal at Claiborne Avenue, a distance of approximately 7,100 feet.[26] (d) A single main track from the throat of the station tracks of the union passenger terminal to a connection at South Broad Street with the three main tracks referred to in (b) above, a distance of approximately 3,850 feet.[26]

7. By the Texas company. (a) A double track from Southport (junction with Illinois Central Railroad) to the junction of the eastern lines at Carrollton Avenue, a distance of approximately 8,900 feet;[27] thence (b) three main tracks to a point near South Dorgenois Street, a distance of approximately 6,400 feet;[26] thence (c) a double track around a loop to the connection of the city's union passenger terminal tracks with the Illinois Central's track near South Gayoso Street, then to a connection with the station tracks of the union passenger terminal at Claiborne Avenue, a distance of approximately 6,800 feet.[26] (d) A single main track from the throat of the station tracks of the union passenger terminal to a connection at South Dorgenois Street with the three main tracks mentioned above (b), a distance of approximately 3,400 feet.[26]

[fol. 29] 8. By the Texas & Pacific. (a) Double main track of the Illinois Central from a connection between

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[25] To be used jointly with the Gulf company and the Louisville & Nashville.

[26] To be used jointly with all the other railroad applicants.

[27] To be used jointly with the Illinois Central, Louisiana company, and Missouri Pacific.

the New Orleans Public Belt track with the southward main track of the Illinois Central at East Bridge Junction to a connection between said main tracks of the Illinois Central and the tracks of the union passenger terminal, when constructed, at or near Southport, a distance of approximately 2.18 miles. (b) Union passenger terminal tracks from the point of connection with the main tracks of the Illinois Central at or near Southport to the union passenger station, when constructed, near the present location of the Illinois Central passenger station at Loyola and Calliope Streets, a distance of approximately 3.92 miles.

9. By the TP-MP Railroad. Same tracks described in II, A, 8, (a) and (b).

B. To acquire joint ownership—

1. By the Illinois Central and the Louisiana company. A track to be constructed by the union passenger terminal from a connection with the tracks of the union passenger terminal at South Dupre Street to a connection with the Illinois Central Poydras yard lead at White Street, a distance of approximately 500 feet.

Certificate and Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 7th day of April, A. D. 1948.

Finance Docket No. 15920

New Orleans Union Passenger Terminal Case

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity (a) require construction of lines of railroad, and acquisition of lines of railroad, by the City of New Orleans, Louisiana, the Louisiana & Arkansas Rail-

way Company, and the Louisville and Nashville Railroad Company, in Orleans and Jefferson Parishes, La., as described in the appendix to said report: *Provided, however,* and this authorization is granted upon the express condition, that construction of said lines of railroad shall be commenced on or before December 31, 1948, and be completed on or before December 31, 1953; and (b) permit abandonment, or abandonment of operation, of lines of railroad by the Chicago, St. Louis and New Orleans Railroad Company, the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana & Arkansas Railway Company, the Louisville and Nashville Railroad Company, the New Orleans and Northeastern Railroad Company, the New Orleans Terminal Company, and the Texas and New Orleans Railroad Company, in Orleans and Jefferson Parishes, La., as described in the appendix to said report; *Provided, however,* and this certificate is issued upon the condition, that none of the lines or operations herein permitted to be abandoned may be abandoned until operation is substituted over lines herein authorized to be constructed, acquired, or jointly used or owned.

It is ordered, That, subject to the conditions for the protection of employees specified in said report, acquisition of joint use, or joint ownership, of lines of railroad, as described in the appendix to said report, by the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad [fol. 30] Company, the Louisiana & Arkansas Railway Company, the Louisville and Nashville Railroad Company, Guy A. Thompson, trustee of the Missouri Pacific Railroad Company, the New Orleans and Northeastern Railroad Company, the Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized.

It is further ordered, That the carriers herein authorized to construct lines of railroad shall report to this Commission in writing the commencement and completion of said lines of railroad within 15 days after such commencement and completion, respectively.

It is further ordered, That tariffs applicable to the lines of railroad or operation herein permitted to be abandoned, may be canceled upon notice to this Commission and to

the general public by not less than 10 days filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the carriers, when filing schedules establishing fares and charges applicable on said lines of railroad herein authorized to be constructed, acquired, or jointly used or owned, or canceling tariffs applicable on said lines of railroad permitted to be abandoned, or operation of which is permitted to be abandoned, shall in such schedules refer to this certificate and order by title, date, and docket number.

It is further ordered, That said carriers shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That this certificate and order shall take effect and be in force from and after 40 days from its date.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal)

[fol. 31] EXHIBIT "B" TO COMPLAINT

[Conditions 4 to 9, inclusive, taken from 257 I.C.C. 177, 197-201]

4. If, as a result of the abandonment of operation herein permitted and the purchases et cetera, herein authorized, hereinafter referred to as the transaction, any employee of Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Company, of The Atchison, Topeka and Santa Fe Railway Company, or of Joseph B. Fleming and Aaron Colnon, trustees of The Chicago, Rock Island and Pacific Railway Company, hereinafter respectively referred to as the Oklahoma, the Santa Fe, and the Rock Island, and collectively as the carriers, is displaced, that is, placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly

displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of this transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position; provided, however, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee; provided, further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance, and provided, further, that no allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island if either of said two last-named carriers offers him a position, the duties of which he is qualified to perform. The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order.

5. If, as a result of the transaction herein approved, any employee, hereinafter referred to as a dismissed employee, of the carriers is deprived of employment with said car-

riers because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as result of the transaction herein approved, he shall be accorded a monthly dismissal allowance equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of this transaction. This allowance shall be made during the protective period to each dismissed employee while unemployed, provided, however, that no such allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island, if either of said two last-named carriers offers him a position, the duties of which he is qualified to perform.

[fol. 32] The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, should agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

6. No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present

authority of law or corporate action or through future authorization which may be obtained.

7. Any employee retained in the services of the carriers involved in the transaction herein approved, or who is later restored to service after being entitled to receive a dismissal allowance, and required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employees affected; provided, however, that changes in place of residence, subsequent to the initial change caused by the transaction, which result from the exercise by the employee of his seniority rights shall not be considered as within the foregoing provision.

8. In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing Conditions Nos. 4, 5, 6, and 7, which cannot be settled by the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representatives.

9. (a) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction herein approved and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value.

In each case the fair value of the home in question shall be determined as of a date sufficiently prior to May 17, 1943, to be unaffected by the filing of the applications herein. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

[fol. 33] 2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancelation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the consummation of the transaction herein approved and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within 1 year after the date employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute may be referred by either part to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively, and these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and con-

clusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party."

[fol. 34] EXHIBIT "C" TO COMPLAINT

Before the Interstate Commerce Commission

Finance Docket No. 15920

PETITION

Filed Nov. 10, 1948

(1) City of New Orleans, Louisiana,
(2) Chicago, St. Louis and New Orleans Railroad Company,
(3) Gulf, Mobile and Ohio Railroad Company,
(4) Illinois Central Railroad Company,
(5) Louisiana & Arkansas Railway Company,
(6) Louisville and Nashville Railroad Company,
(7) Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor,
(8) New Orleans and Northeastern Railroad Company,
(9) New Orleans Terminal Company,
(10) Texas and New Orleans Railroad Company,
(11) The Texas and Pacific Railway Company, and
(12) Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, for authority to construct or acquire certain lines of railroad, to use certain lines of railroad, to abandon certain lines of railroad, and for the City to issue and sell certain bonds, incident to the construction and operation of a Union Passenger Terminal in the City of New Orleans, Louisiana.

Henry G. McCall, Michel Provosty, Francis P. Burns, Robert E. Quirk, Harry McCall, Lucien M. Abbot, Henry L. Walker, Attorneys for Applicants.

November 10, 1948.

[fol. 35] To the Interstate Commerce Commission:

Come now the applicants in the above entitled proceeding, and by this Supplemental Application show as follows:

1. By its original order in this proceeding entered April 7, 1948, the Commission authorized the construction of lines of railroad sought by the applicants in this proceeding, subject to the following condition:

> "*Provided, however,* and this authorization is granted upon the express condition, that construction of said lines of railroad shall be commenced on or before December 31, 1948, and be completed on or before December 31, 1953;".

2. By its Supplemental Order entered May 6, 1948, the Commission authorized the City of New Orleans, one of the [fol. 36] applicants herein, to issue not exceeding $15,000,000 of City of New Orleans Union Passenger Terminal revenue bonds upon the terms and conditions stated in said Supplemental Order.

3. Under date of July 7, 1948, counsel for the applicants addressed a letter to the Commission advising that by reason of certain litigation then pending which involved the validity of many features of the Union Passenger Terminal project, it had been impossible to consummate the sale of the bonds. The suit referred to in the second paragraph of that letter has now been decided in favor of the validity of the terminal project by the Circuit Court of Appeals for the Fifth Circuit, by its order entered October 25, 1948, but the time for applying for a writ of certiorari in the Supreme Court of the United States has not yet expired. The City is therefore not able at this time to go forward with sale of the bonds, which is a prerequisite of the construction of the terminal.

4. As soon as it is possible to do so, the City proposes to sell the bonds, subject to approval of such sale by the Commission, and all the applicants propose to proceed with the project. However, it is not believed that this can be accomplished prior to December 31, 1948. Applicants believe they may reasonably need another year in which to dispose of the pending litigation, sell the bonds, and commence construction of the terminal.

Wherefore, applicants respectfully pray that the Commission enter a fourth supplemental order herein extending the time for commencement of construction of the lines of railroad authorized in this proceeding to December 31, 1949, and extending the time for completion of said lines to December 31, 1954.

Henry G. McCall, Michel Provosty, Francis P. Burns, Robert E. Quirk, Harry McCall, Lucien M. Abbot, Henry L. Walker, Attorneys for Applicants, P. O. Box 1808, Washington 13, D. C.

Certificate of Service

I hereby certify that copies of the foregoing application have this day been served on attorneys for all parties of record by mailing copies thereof properly addressed to such attorneys.

Henry L. Walker, Attorney for Applicants.

Washington, D. C., November 10, 1948.

[fol. 37] EXHIBIT "D" TO COMPLAINT

Interstate Commerce Commission

Order

Finance Docket No. 15920

New Orleans Union Passenger Terminal Case

Present: Charles D. Mahaffie, Commissioner, to whom the above-mentioned matter has been assigned for action thereon.

It appearing, That by certificate and order entered in the above-entitled proceeding, under date of April 7, 1948, the Commission, by division 4, among other things, authorized the construction of certain lines of railroad by the City of New Orleans, Louisiana, et al., upon condition, among others, that said construction be commenced on or before December 31, 1948, and completed on or before December 31, 1953;

It further appearing, That, for good cause shown, the applicants herein will be unable to commence or to complete

the construction of the lines of railroad within the time prescribed and have filed a request that the time for commencement of such construction and the completion thereof be extended respectively to December 31, 1949, and December 31, 1954;

It is ordered, That the time within which the applicants herein shall commence the construction authorized be, and it is hereby, extended to December 31, 1949, and the time for completion thereof extended to December 31, 1954.

Dated at Washington, D. C., on this 22nd day of November, A. D. 1948.

By the Commission, Commissioner Mahaffie.

W. P. Bartel, Secretary. (Seal.)

[fol. 38] EXHIBIT "E" TO COMPLAINT

Third Supplemental Order

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 6th Day of July, A. D. 1948

Finance Docket No. 15920

New Orleans Union Passenger Terminal Case

It appearing, That, by report, certificate, and order dated April 7, 1948, effective 40 days from its date, the Commission, by Division 4, in the above-entitled proceeding, authorized the City of New Orleans, the Chicago, St. Louis and New Orleans Railway Company, and other carriers serving New Orleans, Louisiana, to construct and acquire lines of railroad, to abandon, or abandon operation of lines of railroad, and to jointly use or jointly own lines of railroad in Orleans and Jefferson Parishes, Louisiana, as therein described, all incident to the construction and operation of a union passenger terminal in New Orleans, upon conditions, among others, providing for the protection of carrier employees for a period of 4 years from the effective date of said certificate and order;

It further appearing, That by supplemental report and order dated May 6, 1948, the Commission, by Division 4, authorized the City of New Orleans to issue and sell not

exceeding $15,000,000 of New Orleans Union Passenger Terminal revenue bonds, such authority to become effective on the effective date of the authorizations granted in the certificate and order of April 7, 1948;

It further appearing, That the Railway Labor Executives' Association filed a petition requesting that the Commission reopen the proceeding solely for the purpose of reconsidering the time limit prescribed for the protection of carrier employees in the above-mentioned report of April 7, 1948;

It further appearing, That by order of the Commission, by Division 4, dated May 13, 1948, the said proceeding was reopened solely for the purpose of permitting reconsideration by the Commission of the questions raised and contentions made by said petitioner;

It further appearing, That the applicants filed a reply to the said petition;

And it further appearing, That the Commission has considered the record herein, the questions raised and the contentions made by the petitioner and the applicants, and has reached the conclusion that there has been presented no evidence of error of fact or law as to the said time limit prescribed for the protection of employees;

It is ordered, That said petition of The Railway Labor Executives' Association for reconsideration be, and it is, hereby, denied.

By the Commission.

(Seal) W. P. Bartel, Secretary.

[fol. 39] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION FOR DESIGNATION OF A DISTRICT COURT OF THREE JUDGES—Filed February 16, 1949

The above entitled action being required by Section 2325 of Title 28, United States Code to be heard and de-

termined by a district court of three judges, plaintiff respectfully moves that the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit be so notified by the district judge to whom the complaint in this action is presented and requested to designate a district court of three judges, pursuant to the provisions of Section 2284 of Title 28, United States Code, to hear and determine the action.

Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen, 741 Nicholas Building, Toledo 4, Ohio; Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C., Attorneys for plaintiff.

Of Counsel: Mulholland, Robie, McEwen & Hickey, 620 Tower Building, Washington 5, D. C.

[fol. 40] *Certification of Service*

I hereby certify that the foregoing motion has been duly served upon the defendant herein by mailing a copy thereof by registered mail on February 16, 1949, to the Attorney General of the United States, Department of Justice, Washington, D. C., and to the United States Attorney for the District of Columbia. A copy has also been personally served upon counsel for the Interstate Commerce Commission.

Edward J. Hickey, Jr., 620 Tower Building, Washington, D. C., Attorney for Plaintiff.

February 16, 1949.

[fol. 41] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed March 30, 1949

Now comes the United States of America, defendant in the above-entitled action, and in response to the complaint filed herein answers and says:

1. Defendant admits that this Court has jurisdiction over the subject matter of this action and the parties thereto.

2. Defendant admits that the Interstate Commerce Commission duly made its report and order of April 7, 1948 (Exhibit A to complaint), assailed in part in the present action, authorizing certain new construction, abandonment, and acquisition of lines of railroad, in connection with the construction of a new passenger station at New Orleans, Louisiana; and admits that plaintiff's petition for reconsideration of said order (Exhibit E to complaint) was denied on July 6, 1948.

3. Defendant admits that in its said order the Commission imposed certain conditions for the protection of employees, and restricted the duration of such protection to a period of 4 years from the effective date of said order.

[fol. 42] 4. Defendant denies that said order is invalid for the reasons set forth by plaintiff, or for any reason, and alleges that said order was, as the Commission found, in exact accordance with the Commission's power as delineated and specified in the second sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U. S. C. 5 (2)(f)). Defendant alleges that the circumstance that the terminal will not be completed until after 5 years, while the protective period of 4 years will thus have elapsed before the impact upon the employees of the adverse effect resulting from the transactions approved by the Commission, is a circumstance regarding which the employees and carriers are free to make a voluntary agreement pursuant to the last sentence of Section 5(2)(f) of the act but regarding which the Commission has no power under existing law to impose requirements having longer duration than that specified in the second sentence of Section 5 (2)(f) of the act.

5. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained to the extent of any inconsistency with the Commission's report of April 7, 1948, to which the Court is respectfully referred for a full and complete account of the facts involved in this litigation.

Wherefore, defendant prays that the relief prayed for by plaintiff be denied and the complaint dismissed.

Edward Dumbauld, William D. McFarlane, Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C.

Herbert A. Bergson, Assistant Attorney General. George Morris Fay, United States Attorney.

[fol. 43] I certify that a copy of the foregoing answer was this day mailed to the following persons:

Edward J. Hickey, Jr., Esq., 620 Tower Building, Washington 5, D. C.; Daniel W. Knowlton, Esq., Interstate Commerce Commission, Washington 25, D. C.

This 23rd day of March, 1949.

Edward Dumbauld, Special Assistant to the Attorney General.

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS—Filed April 1, 1949

[fol. 45] The City of New Orleans, Louisiana, a municipal corporation, Chicago, St. Louis and New Orleans Railroad Company, a corporation, Gulf, Mobile and Ohio Railroad Company, a corporation, Illinois Central Railroad Company, a corporation, Louisiana and Arkansas Railway Company, a corporation, Louisville and Nashville Railroad Company, a corporation, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, a corporation, New Orleans Terminal Company, a corporation, Texas and New Orleans Railroad Company, a corporation, The Texas and Pacific Railway Company, a corporation, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, a corporation, pursuant to Rule 24 (a) (1) of the Rules of Civil Procedure, move for leave to intervene as defendants in this action in order to assert defenses set forth in the proposed pleading and answer, a copy of which is attached hereto. In support of this motion, the said corporations and each of them allege that:

1. Each of said applicants, City of New Orleans, Louisiana, Chicago, St. Louis and New Orleans Railroad Com-

pany, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisiana and Arkansas Railway Company, Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans is a common carrier by rail serving New Orleans, Louisiana.

2. Plaintiff, the Railway Labor Executives' Association, prays in its complaint that the order of the Interstate Commerce Commission, entered in the proceeding known as *New Orleans Union Passenger Terminal Case*, Finance Docket No. 15920, be set aside, enjoined and annulled, in part.

[fol. 46] 3. The proceeding before the Interstate Commerce Commission referred to in paragraph 2 hereof was instituted by the applicants for intervention for the purpose of securing necessary authority under the Interstate Commerce Act, for rearrangement of tracks and the financing incident to the construction of Union Passenger Terminal in the City of New Orleans.

4. This suit involves the validity of the order of the Interstate Commerce Commission referred to in paragraph 2 hereof, and the interests of these applicants for intervention may be adversely affected by any order or judgment entered in this action.

5. Section 2323 of Title 28, United States Code, confers on these applicants for intervention an unconditional right to intervene in this action.

Henry B. Curtis, City Hall, New Orleans 7, La.; Harry McCall, 724 Whitney Building, New Orleans, Louisiana; D. C. Fitch, Jr., 1025 Elm Street, Dallas 2, Texas; Henry L. Walker, W. S. Macgill, Southern Railway Building, 15th & K Sts., N. W., Washington 5, D. C., Attorneys for Applicants for Intervention.

To: Railway Labor Executives' Association, Plaintiff:

To: United States of America, Defendant:

Please take notice that the undersigned will bring the [fol. 47] above motions for hearing before the Court at a time, day and place set by the Court.

Henry B. Curtis, Harry McCall, D. C. Fitch, Jr., Henry L. Walker, W. S. Macgill, Attorneys for Applicants for Intervention.

Dated: April 1, 1949.

NOTICE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene as Defendants and the accompanying Intervenors' Answer to Complaint were mailed, postage prepaid, to Edward J. Hickey, Jr., counsel for plaintiff, 620 Tower Building, Washington 5, D. C.; to the Attorney General of the United States, attention of Edward Dumbauld and William D. McFarland, Special Assistants to the Attorney General, attorneys for the defendant United States of America, Department of Justice, Washington 25, D. C.; and to Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C., on the 1st day of April 1949.

W. S. Macgill.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

RAILROAD INTERVENORS' ANSWER TO COMPLAINT

Now come the City of New Orleans, Louisiana, Chicago, St. Louis and New Orleans Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisiana and Arkansas Railway Company, Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans

Terminal Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, referred to hereafter as the "railroad intervenors" and answer the complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

[fol. 49] Second Defense

Railroad intervenors answer the specific allegations of the complaint as follows (the paragraphs of this Defense are numbered to correspond with the paragraph numbers in the complaint):

1-13. Railroad intervenors admit the allegations of Paragraphs 1 through 13 of the complaint.

14. Railroad intervenors admit the allegations of Paragraph 14 except that (a) they deny the soundness of the contention of plaintiff stated in the third sentence and (b) they further aver that the litigation referred to in the fifth sentence has now been terminated and the bonds have now been issued and the proceeds are in hand to finance the construction authorized by the Commission's order.

In further answer to the allegations of Paragraph 14 of the complaint, railroad inervenors allege that the protective period of four years provided in the conditions pertaining to employees adversely affected does provide adequate and real protection to any and all employees who may be affected by the consummation of the projects as authorized by the Commission, all as required and provided by Section 5 (2) (f) of the Interstate Commerce Act.

15. Railroad intervenors deny the allegations of Paragraph 15 of the complaint except that (a) they admit that plaintiff did make the alleged contention in its petition for reconsideration by the full Commission and (b) they admit the allegations of the last sentence of Paragraph 15 of the complaint.

16. Railroad intervenors admit the allegations of Paragraph 16 of the complaint.

17. Railroad intervenors deny the allegations of Paragraph 17 of the complaint.

18. Railroad intervenors deny the allegations of Paragraph 18 of the complaint.

[fol. 50] 19. Railroad intervenors deny the allegations of the first sentence of Paragraph 19 of the complaint, but admit the allegations of the second and third sentences of Paragraph 19 of the complaint.

Wherefore, railroad intervenors respectfully pray that the complaint be dismissed.

Henry B. Curtis, City Hall, New Orleans 7, La.; Harry McCall, 724 Whitney Building, New Orleans, Louisiana; D. C. Fitch, Jr., 1025 Elm Street, Dallas 2, Texas; Henry L. Walker, W. S. Macgill, Southern Railway Building, 15th & K Streets, N. W., Washington 5, D. C., Attorneys for Intervenors.

Dated: April 1, 1949.

[fol. 51] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed April 2, 1949

To the Honorable the Judges of Said Court:

In accordance with the provisions of Section 2323, Title 28, U. S. Code, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

Daniel W. Knowlton, Chief Counsel; Edward M. Reidy, Assistant Chief Counsel, for Interstate Commerce Commission.

[fol. 52] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 2, 1949

The Interstate Commerce Commission, intervening defendant in the above-entitled action, hereinafter referred to as the Commission, for answer to the bill of complaint, answers and says:

I

Answering the allegations of paragraphs 1 to 6, inclusive, of the complaint, the Commission admits the allegations thereof.

II

Answering the allegations of paragraph 7 of the complaint, the Commission admits the same except that it refers the court to its report of April 7, 1948, 267 I. C. C. 763, attached to and made a part of the complaint as Exhibit A, for a more full and complete statement of the proceedings than is contained in said paragraph 7.

III

Answering the allegations of paragraph 8 of the complaint, the Commission admits the same.

[fol. 53] IV

Answering the allegations of paragraphs 9 and 10 of the complaint, the Commission admits the same, except that it refers the court to its report of April 7, 1948, and its supplemental report of May 6, 1948, for a more full and complete statement of its findings and conclusions than is contained in said paragraphs.

V

Answering the allegations of paragraphs 11 and 12 of the complaint, the Commission admits that it made, in substance, the findings summarized in said paragraphs, but alleges in

his connection that the reasons and subsidiary findings sup-orting its ultimate conclusions are more fully discussed in ts report, Exhibit A to the complaint, to which the Commis-ion respectfully refers the court.

VI

Answering the allegations of paragraph 13 of the com-laint, the Commission admits the same.

VII

Answering the allegations of paragraphs 14 and 15 of the omplaint, the Commission refers the court to plaintiff's etition for reconsideration and modification, therein re-erred to, for a complete statement as to plaintiff's con-entions.

Further answering the allegations of paragraph 14 of the omplaint, the Commission is informed and believes that he litigation referred to in the fifth sentence of said para-raph has now been terminated and the bonds referred to n said paragraph have now been issued and the proceeds re in the hands of railroad intervenors to finance the con-truction authorized by the Commission's order. The Com-nission further alleges that the protective period of four fol. 54] years provided in the conditions pertaining to em-loyees adversely affected does provide adequate and real rotection to any and all employees who may be affected by he consummation of the projects as authorized by the Com-nission, as required by section 5 (2) (f) of the Interstate Commerce Act, and the Commission denies the allegations o the contrary contained in said paragraph.

With further reference to the allegations contained in aragraph 15 of the complaint, the Commission admits that ection 5 (2) (f) is correctly quoted in said paragraph, and dmits that plaintiff made the contentions therein set forth n its petition for reconsid..ation and modification. Such ontentions were answered in the Commission's report, Exhibit A to the bill of complaint, to which reference is ereby made.

VIII

Answering the allegations of paragraph 16 of the com-laint, the Commission admits the same, but alleges in this

connection that it reached the conclusion that the petition for reconsideration should be denied, after consideration of said petition and the entire record in the proceeding, and upon consideration of replies to said petition filed by railroad intervenors.

IX

Answering the allegations of paragraphs 17 and 18 of the complaint, the Commission denies the same.

X

Answering the allegations of paragraph 19 of the complaint, the Commission admits that the plaintiff has fully pursued its administrative remedy before the Commission and that this court has jurisdiction. The Commission denies the other allegations of this paragraph.

[fol. 55] Further answering the allegations of the complaint, the Commission alleges that in the hearings held on the application referred to in paragraph 7 of the bill of complaint, the Commission considered testimony and other evidence submitted on behalf of the plaintiff herein by counsel for said plaintiff; that at said hearings and subsequently, in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including questions raised by plaintiff in this action, whereupon the Commission determined said matters and entered and duly served upon the plaintiff herein, and upon other interested parties, its report and certificate, Exhibit A to the bill of complaint.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties in said proceeding by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

Answering the allegations of the bill of complaint, the Commission denies that in issuing its report and certificate

hereinbefore referred to, it exceeded its statutory power or acted arbitrarily, unreasonably or erroneously in any respect. The Commission denies that its said report and certificate are invalid for the reasons set out in said bill of complaint, or for any other reason.

[fol. 56] Further answering the allegations of the bill of complaint, the Commission denies that plaintiff will suffer irreparable injury as a result of the Commission's decision in this proceeding.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and certificate, hereinbefore referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission by Daniel W. Knowlton, Chief Counsel, Edward M. Reidy, Assistant Chief Counsel.

[fol. 57] *Duly sworn to by Charles D. Mahaffie. Jurat omitted in printing.*

[fol. 58] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF JUDGES TO SERVE ON THREE JUDGE DISTRICT COURT—Filed April 8, 1949

The Honorable David A. Pine, United States District Judge for the District of Columbia, having notified me that the plaintiff in the above entitled action has presented to him an application to set aside and annul, in part, an order of the Interstate Commerce Commission, now, therefore, pursuant to the provisions of Section 2284 of Title 28, United States Code, I hereby designate the Honorable Bennett C. Clark, United States Circuit Judge for the District

of Columbia Circuit, and the Honorable Jennings Bailey, United States District Judge for the District of Columbia, to serve with the Honorable David A. Pine, United States District Judge, as members of a district court to hear and determine this action.

Dated April 7, 1949.

Harold M. Stephens, Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

[fol. 59] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE AS DEFENDANTS—Filed April 12, 1949

This cause was heard on the motion of City of New Orleans, Louisiana, Chicago, St. Louis and New Orleans Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisiana and Arkansas Railway Company, Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans pursuant to Rule 24 (a) (1) of the Rules of Civil Procedure, for leave to intervene as defendants herein and the Court having considered the motion and being advised in the premises, it is

Ordered that City of New Orleans, Louisiana, Chicago, St. Louis and New Orleans Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisiana and Arkansas Railroad Company, Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Texas and New Orleans Rail-

road Company, The Texas and Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans be and they hereby are granted leave to intervene herein as defendants.

Bennett C. Clark. Jennings Bailey. David A. Pine.

Dated: This 12th day of April, 1949.

[fol. 60] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION OF PLAINTIFF, RAILWAY LABOR EXECUTIVES' ASSOCIATION, FOR SUMMARY JUDGMENT—Filed April 21, 1949

Now comes the plaintiff, Railway Labor Executives' Association, through its attorneys and moves the Court to grant summary judgment for the plaintiff, and for reasons therefor, says:

1. Plaintiffs' complaint and the answers of the defendant United States of America and intervening defendants on file herein show that there is no genuine issue as to any material fact in this case.

2. Plaintiff is entitled to a judgment as a matter of law.

Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen, 741 Nicholas Building, Toledo 4, Ohio. Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C., Attorneys for plaintiff.

Of Counsel. Mulholland, Robie, McEwen & Hickey, 620 Tower Building, Washington 5, D. C.

Dated: April 21, 1949.

[fol. 61] Certificate of Service

I hereby certify that the foregoing motion for summary judgment was served upon the defendant parties of record in this procedure by personally serving a copy thereof this

21st day of April, 1949, upon the following named counsel for each of said parties:

Edward Dumbauld and William D. McFarland, Special Attorneys to the Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the defendant United States of American.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C.

Henry A. Walker and W. S. Macgill, Southern Railway Building, 15th and K Streets, N. W., Washington 5, D. C., Attorneys for railroad intervenors.

Edward J. Hickey, Jr.

[fol. 62] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION OF RAILROAD INTERVENOR DEFENDANTS FOR SUMMARY JUDGMENT—Filed April 22, 1949

Now come the railroad intervenor defendants, City of New Orleans, Louisiana, Chicago, St. Louis and New Orleans Railroad Company, Gulf Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Louisiana and Arkansas Railway Company, Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, through their attorneys, and move the court to grant summary judgment for the defendants, and for reasons therefor, say:

1. The pleadings on file herein show that there is no genuine issue as to any material fact in this case.

2. Defendants are entitled to judgment as a matter of law.

Henry B. Curtis, City Hall, New Orleans 7, La. Harry McCall, 724 Whitney Building, New Orleans, Louisiana. D. C. Fitch, Jr., 1025 Elm Street, Dallas 2, Texas. Henry L. Walker, W. S. Macgill, Southern Railway Building, 15th & K Streets, N. W., Washington 5, D. C., Attorneys for Railroad Intervenors.

Dated: April 22, 1949.

[fol. 63] Notice of Service

I hereby certify that a copy of the foregoing Motion of Railroad Intervenor Defendants for Summary Judgment was mailed, postage prepaid, to Edward J. Hickey, Jr., counsel for plaintiff, 620 Tower Building, Washington 5, D. C.; to Edward Dumbauld and William D. McFarland, Special Assistants to the Attorney General, attorneys for the defendant United States of America, Department of Justice, Washington 25, D. C.; and to Daniel W. Knowlton, Chief Counsel for the Interstate Commerce Commission, Interstate Commerce Commission, Washington 25, D. C., on the 22nd day of April 1949.

W. S. Macgill.

[fol. 64] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

COUNTER MOTION OF DEFENDANTS, UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, FOR SUMMARY JUDGMENT—Filed April 25, 1949

Come now the defendants, United States of America and Interstate Commerce Commission, through their attorneys and move the Court to grant summary judgment for defendants United States of America and Interstate Commerce Commission and for the reasons therefor, say:

1. Plaintiff's complaint and the answers of the defendants United States of America, Interstate Commerce Com-

mission and intervening defendants on file herein show that there is no genuine issue as to any material fact in this case.

2. Defendants United States of America and Interstate Commerce Commission are entitled to a judgment as a matter of law.

Dated April 25, 1949.

Edward Dumbauld, Special Assistant to the Attorney General; William D. McFarlane, Special Assistant to the Attorney General, Attorneys for the United States of America, Department of Justice, Washington, D. C.; Daniel W. Knowlton, Chief Counsel, Attorney for the Interstate, Commerce Commission.

Herbert A. Bergson, Assistant Attorney General; George Morris Fay, United States Attorney.

[fol. 65] I certify that a copy of the foregoing counter motion of defendants, United States of America and Interstate Commerce Commission, for summary judgment was this day mailed to the following persons:

Edward J. Hickey, Jr., Esq., 620 Tower Building, Washington 5, D. C.

W. S. Macgill, Esq., Attorney for City of New Orleans, La., Chicago, St. Louis and New Orleans Railroad Company, et al., Intervenors, Box 1808, Washington 13, D. C.

This 25th day of April, 1949.

William D. McFarlane, Special Assistant to the Attorney General.

[fol. 66] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 646-49

RAILWAY LABOR EXECUTIVES' ASSOCIATION, Plaintiff,

v.

UNITED STATES OF AMERICA, et al., Defendants

Before Clark, Circuit Judge, and Bailey and Pine, District Judges, Sitting as a Statutory Three-Judge Court

MEMORANDUM OPINION OF THREE-JUDGE COURT—Filed May 27, 1949

PINE, J.:

This is an action to set aside, in part, an order of the Interstate Commerce Commission. The defendants are the United States and the Interstate Commerce Commission. The City of New Orleans and certain railroad companies have been granted leave to intervene as defendants. All parties and intervenors have respectively moved for summary judgment. There is no genuine issue of a material fact.

The order involved herein granted the railroad intervenors authority under the Interstate Commerce Act to rearrange their tracks incident to the construction of a Union Passenger Terminal in the City of New Orleans. Plaintiff seeks to set aside that part of the order making provision for protecting the interests of employees adversely affected by the grant of authority.

The total number of employees affected has been estimated at 1022. The number required to operate the Union Passenger Terminal has been estimated at 680. So far as feasible the personnel will be recruited from employees displaced. The estimates indicate a net displacement of from 300 to 350 employees. The physical consummation of the project will require four or five years.

The part of the order to which exception is taken provides as follows:

> "We are of opinion that a fair and equitable arrangement for protecting the interests of employees adversely affected by the applicants' proposals here will be provided by conditions similar to conditions (4) to (9) inclusive, imposed by us in Oklahoma Ry. Co. Trustees Abandonment, 257 I. C. C. 177 (197-201) which are similar to those prescribed in Chicago, B. & Q. R. Co., Abandonment, supra, and our approval and authorization herein will be granted subject to those conditions."

[fol. 67] The order in Oklahoma Railway Co. Trustees Abandonment, referred to, contains the following language:

> "The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of four years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order."

The statute under which the order was made is Section 5(2)(f) of the Transportation Act of 1940,[1] and so far as material, reads as follows:

> "As a condition of its approval . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded . . . shall not

[1] 49 U. S. C. A. 5(2)(f).

be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

Plaintiff contends that the four-year period specified in the statute fixes the minimum period of employee protection, leaving the Commission with discretion to extend such period, and proposed before the Commission that the protection should continue for at least four years from the time employees shall be adversely affected, it being plaintiff's position that the order involved herein provides no protection whatever to employees who will be adversely affected by authorized transactions which will not be completed until after the protected period prescribed has expired. Defendants contend that the language plainly does not authorize the Commission to prescribe any protective period, other than a "period of four years from the effective date" of the Commission's order of approval, the only qualification being in the case of employees of less than four years employment, where the protective period cannot be longer than the employees' prior employment.

[fol. 68] The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f) of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that "the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specification therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f)."

In our view the language of the statute in question is clear and unambiguous and the Commission's interpretation is correct. The first sentence thereof provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence prescribes the standard for such arrangements, namely that they shall be such that the employees will not be placed in a worse position with respect to their employment, and then proceeds to limit the time of such protection, namely four years from the effective date of [illegible] approval order. In addition, this interpretation is in accordance with

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 337

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

CLARENCE M. MULHOLLAND,
EDWARD J. HICKEY, JR.,
Counsel for Appellant.

the Commission's prior construction of the statute,[2] and on that account is entitled to great weight. Finally, the legislative history set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute.

[fol. 69] We are therefore of the view that the motions for summary judgment filed by the defendants should be granted and the complaint should be dismissed.

Counsel will submit appropriate order.

Bennett Champ Clark, Circuit Judge; Jennings Bailey, District Judge; David A. Pine, District Judge.

May 27, 1949.

[fol. 70] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 646-49

RAILWAY LABOR EXECUTIVES' ASSOCIATION, Plaintiff,

v.

UNITED STATES OF AMERICA, et al., Defendants

JUDGMENT, ORDER AND DECREE—Filed June 17, 1949

This cause came on to be heard on the 6th day of May 1949, on an action to set aside in part an order of the Interstate Commerce Commission, and all parties and intervenors having moved for summary judgment, there being no genuine issue of a material fact, and the Court having heard the arguments of counsel for all parties, and the Court having

[2] Texas & Pac. Ry. Co., et al., Operation, etc. (1941), 247 I. C. C. 285, 295, 296; Chicago, Milwaukee, St. Paul & Pac. Ry. Co., Trustees, et al., Construction, etc. (1942), 252 I. C. C. 49, 66, 252 I. C. C. 287, 257 I. C. C. 292; Okla. Ry. Co. Trustees, Abandonment, etc., 257 I. C. C. 177, 196-202; Chicago, Burlington & Quincy R. R. Co. (1944), 257 I. C. C. 700.

considered the matter and being fully advised in the premises, and having concluded, found and determined that the motions for summary judgment filed by the defendants should be granted and the complaint dismissed,

It is hereby ordered, adjudged and decreed that the motions for summary judgment filed by the defendants, be and they are hereby granted, and the complaint is hereby dismissed with prejudice at plaintiff's costs.

This 17th day of June, 1949.

Bennett Champ Clark, Circuit Judge; Jennings Bailey, District Judge; David A. Pine, District Judge.

Seen: Edward J. Hickey, Jr., Attorney for Plaintiffs; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; W. S. Macgill, Attorney for Railroad Intervenors.

[fol. 71] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR APPEAL—Filed August 16, 1949

Railway Labor Executives' Association, plaintiff in the above-entitled cause, feeling itself aggrieved by the final judgment and decree of this Court entered on June 17, 1949, pray an appeal from said judgment and decree to the Supreme Court of the United States.

The particulars wherein said plaintiff considers the judgment and decree erroneous are set forth in the Assignment of Errors accompanying this petition, to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers on which said judgment and decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated August 16, 1949.

Clarence M. Mulholland, Edward J. Hickey, Jr., Attorneys for Plaintiff.

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL—Filed August 16, 1949

To: The Attorney General of the United States, Interstate Commerce Commission, Above-named Intervening Railroads:

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, the Railway Labor Executives' Association, plaintiff in the above-entitled cause, does hereby appeal to the Supreme Court of the United States from the final judgment and decree of the [fols. 73-74] United States District Court in the District of Columbia made and entered on June 17, 1949, denying the relief prayed by plaintiff and dismissing the complaint.

Dated August 16, 1949.

Clarence M. Mulholland, Edward J. Hickey, Jr., Attorneys for Plaintiff.

[fol. 75] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 16, 1949

The Railway Labor Executives' Association, plaintiff in the above-entitled cause, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in said cause entered on June 17, 1949, and having also made and filed an Assignment of Errors, and a Statement of Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided:

It is ordered and decreed, that the said appeal be, and the same is hereby, allowed as prayed.

Dated August 16, 1949.

R. B. Keech, United States District Judge.

[fols. 76-97] Citation in usual form, filed August 16, 1949, omitted in printing.

[fol. 98] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS.—Filed August 16, 1949

Now comes the Railway Labor Executives' Association, plaintiff in the above-entitled cause, and in connection with their appeal herein, files the following assignment of errors upon which it will rely in its prosecution of said appeal to the Supreme Court of the United States from the final judgment and decree of the District Court dated June 17, 1949.

The District Court erred:

1. In holding and concluding that under Section 5(2)(f) of the Interstate Commerce Act the Interstate Commerce Commission has no authority to provide any other period of protection than one of four years from the effective date of its order.

2. In holding and concluding that the second sentence of the said Section 5(2)(f) provides a standard which restricts the Commission from exercising any discretion in complying with the requirements of the first sentence of said section.

3. In failing to hold and conclude that although the Commission is required by the said Section 5(2)(f) to provide a period of protection of at least four years from the effective date of its order, it is not precluded by that section from providing a longer period if the facts and circumstances of a particular case require such longer

period in order to provide a fair and equitable arrangement for the protection of employees.

[fol. 99] 4. In failing to hold and conclude that the basic intent of Congress in the said Section 5(2)(f) was to provide a fair and equitable arrangement for the protection of employees, adversely affected by consolidation and coordination transactions, and was not simply and exclusively to require protection of a specific sort for a definite period as the sole protection which could be authorized and which might or might not constitute a fair and equitable arrangement for employees.

5. In failing to hold and conclude that the first provision or sentence of the said Section 5(2)(f) has intention, meaning, and purpose separate and apart from the mandatory requirements of the second provision or sentence thereof, with a consequent vesting of discretion in the Commission over and above the specific minimum requirements of the second sentence or provision.

6. In failing to hold and conclude that although the second sentence or provision of the said Section 5(2)(f) states a minimum protection both of type and extent in time which the Commission must provide, the section as a whole does not require the acceptance of said minimum provision as the maximum protection which may be authorized.

7. In construing the said Section 5(2)(f) in such manner as to bring about an inequitable, unreasonable, and unintended result contrary to the basic purpose and intent of Congress in providing the legislation.

8. In holding and concluding that the legislative history of the said Section 5(2)(f) supports the Commission's construction of the statute.

9. In failing to hold and conclude that the legislative history of Section 5(2)(f) does not support the Commission's construction of the statute but does support the construction urged by plaintiff.

10. In holding and concluding that certain decisions of the Commission cited in the District Court's opinion reflect the Commission's prior construction of the statutory provision in question and that on that account the Commission's construction is entitled to great weight.

[fol. 100] 11. In entering a judgment and decree granting defendants' motions for summary judgment and dismissing the Complaint.

12. In failing to hold and conclude that the Commission's construction of Section 5(2)(f) is contrary to law and invalid and should be set aside.

13. In failing to enter a judgment and decree granting plaintiff's motion for summary judgment.

Dated August 16, 1949.

Clarence M. Mulholland, Edward J. Hickey, Jr., Attorneys for Plaintiff.

[fol. 101] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PRAECIPE—Filed August 16, 1949

The Clerk will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include therein:

1. Complaint to set aside in part an order of the Interstate Commerce Commission.
2. Motion by plaintiff for designation of District Court of three judges.
3. Order of April 8, 1949, designating judges to serve on three-judge District Court.
4. Answer of the United States of America.
5. Intervention of the Interstate Commerce Commission.
6. Answer of the Interstate Commerce Commission.
7. Motion of railroads to intervene as defendants and attached Answer.
8. Order of April 12, 1949, granting railroad intervenors leave to intervene as defendant.
9. Motion of plaintiff, Railway Labor Executives' Association, for summary judgment.

10. Counter motion of defendants, United States of America and Interstate Commerce Commission, for summary judgment.

11. Motion of railroad intervenor defendants for summary judgment.

12. Copy of Report and Order of Interstate Commerce Commission dated April 7, 1948, 267 I. C. C. 763, certified copy of which is attached as Exhibit A to the Complaint. [fol. 102] 13. Memorandum opinion of three-judge District Court dated May 27, 1949.

14. Judgment order and decree of District Court dismissing complaint entered on June 17, 1949.

15. Petition for appeal of plaintiff, Railway Labor Executives' Association, filed August 16, 1949.

16. Order allowing appeal dated August 16, 1949.

17. Citation on Appeal dated August 16, 1949.

18. Statement to appellees pursuant to subparagraph 2 (b) of Rule 12 of the Rules of the Supreme Court.

19. Jurisdictional Statement.

20. Notice of Appeal.

21. Assignment of Errors.

22. Acknowledgment of Service required by subparagraph 2(b) of Rule 12 of the Rules of the Supreme Court.

23. This designation dated August 16, 1949.

Clarence M. Mulholland, Edward J. Hickey, Jr., Attorneys for Plaintiff.

[fol. 103] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER ALLOWING USE OF ORIGINAL RECORD ON APPEAL—Filed September 7, 1949

An order allowing an appeal herein having been entered on August 16, 1949, from the judgment of the court dated June 17, 1949, and plaintiff having requested that the original papers be transmitted on appeal to the Supreme Court, and the defendants having consented thereto, it is hereby

Ordered, Adjudged, and Decreed, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, that the original papers herein may be transmitted to the Supreme Court of the United States.

Dated September 7th, 1949.

Edward A. Tamm, United States District Judge.

Consented to: W. D. McFarland, Counsel for defendant-appellee, United States of America. Daniel W. Knowlton, Counsel for defendant-appellee, Interstate Commerce Commission. W. S. Macgill, Counsel for defendant-appellee railroads.

[fol. 104] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 105-106] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 337

RAILWAY LABOR EXECUTIVES' ASSOCIATION, Appellant,

v.

UNITED STATES OF AMERICA, et al., Appellees

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD TO BE PRINTED—Filed September 28, 1949

In its brief and oral argument before this Court on its appeal in the above entitled case, appellant will rely upon the points made in its Assignment of Errors.

Appellant further states that the entire record in this cause as filed in this Court pursuant to the praecipe for transcript of record is designated for printing.

Clarence M. Mulholland, 741 Nicholas Building, Toledo 4, Ohio; Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C., Attorneys for Appellant, Railway Labor Executives' Association.

Of Counsel, Mulholland, Robie, McEwen & Hickey.

Dated: September 28, 1949.

[fol. 106a] [File endorsement omitted.]

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 24, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Douglas took no part in the consideration of this order.

Endorsed on Cover: File No. 54086. United States District Court for the District of Columbia. Term No. 337. Railway Labor Executives' Association, Appellant, vs. The United States of America, Interstate Commerce Commission, City of New Orleans, Louisiana, et al. Filed September 15, 1949. Term No. 337 O. T. 1949.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 646-49

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Railway Labor Executives' Association, submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and decree of the District Court entered in this cause on June 17, 1949. The petition for appeal was filed and the order allowing the appeal was entered on August 16, 1949.

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and decree complained of is conferred by the Judicial Code as revised by the Act approved June 25, 1948, effective Septem-

ber 1, 1948, entitled Title 28, U. S. Code, Sections 1253 and 2101(b), consolidating and continuing the substance of prior provisions of law relating to direct appeals from decisions of three-judge courts in suits to set aside in whole or in part orders of the Interstate Commerce Commission. The following decisions, among others, in which appeals were taken pursuant to such prior provisions thus codified, sustain the jurisdiction of the Supreme Court of the United States to review the judgment and decree on direct appeal in this case:

United States v. *Lowden*, 308 U. S. 225;

Interstate Commerce Commission v. *Railway Labor Executives' Association*, 315 U. S. 373.

Statute Involved

The statutory provision involved in this case is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C., §5(2)(f)), which provides as follows:

> (f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection

of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Issue

The single question presented for decision is whether Section 5(2)(f) of the Interstate Commerce Act requires the Commission to limit all protection of employees adversely affected to a period of four years from the effective date of its order of approval. More particularly, the question raised is whether the specific requirements of the second sentence of Section 5(2)(f) preclude the Commission from exercising any discretion under the first sentence of the Section with respect to the nature and extent in time of employee protection.

Nature of the Case and Rulings Below

On November 21, 1947, the City of New Orleans, Louisiana, which, through the agency of its Public Belt Railroad Commission, owns and operates a belt line of railroad, together with certain common carriers by railroad (intervening defendants-appellees herein), filed a joint application with the Interstate Commerce Commission for approval of certain proposed transactions. Authority was sought to construct and acquire certain lines of railroad, to jointly own or use lines of railroad, and to abandon certain other lines or operations—all as necessary incidents to the construction of a new railroad passenger terminal at New Orleans and the removal within that city of certain trackage for the pupose of eliminating undesired grade crossings.

The Railway Labor Executives' Association, plaintiff-appellant herein, intervened in the Commission proceeding as a representative of the interests of the employees

of the railroad carriers involved. It did not oppose the project, but it urged that if the requested authorizations were granted, they be made subject as required by section 5(2)(f) of the Interstate Commerce Act,[1] to a fair and equitable arrangement for the protection of railroad employees displaced from their positions or otherwise adversely affected as a result of the transactions.

After hearing Division 4 of the Commission on April 7, 1948, entered its report and order,[2] authorizing the proposed transactions.

From its review of the evidence of record, the Commission found that employees definitely would be adversely affected by applicants' proposals.[3] The Commission did not attempt to fix the exact number of employees who ultimately would be affected, but relied upon estimates by a committee of transportation officers that, based on present day conditions, approximately 1022 employees would be adversely affected by the transactions, and that about 350 would eventually lose their jobs.[4] The Commission also stated that it was admittedly impossible, at the time of its order, to ascertain the identity of the estimated number of employees who would be released from service or otherwise be adversely affected.[5]

Because of its finding that employees definitely would be adversely affected, the Commission concluded that it was required to provide "a fair and equitable arrangement to protect the interests of employees so affected", and further found that "the benefit of such arrangement necessarily must extend to all the railroad employees af-

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[1] 54 Stat. 906, 49 U.S.C. § 5(2)(f).

[2] 267 I.C.C. 763.

[3] 267 I.C.C. 763, 782.

[4] 267 I.C.C. at 777-778.

[5] 267 I.C.C. at 780.

fected by the exercise of the authorizations herein granted."[6]

Accordingly, the transactions proposed were approved subject to certain conditions required by Section 5(2)(f) of the Interstate Commerce Act, *supra*, and purportedly were provided for the protection of all railroad employees who would later be adversely affected as a result of the project.

The specific protective conditions which the Commission imposed in this case were not set forth in the Commission's report, but are incorporated therein by reference to a previous Commission decision wherein they are specifically enumerated. Plaintiff-appellant has set forth these conditions in Exhibit B to its Complaint. Briefly, they deal with (1) allowances for displacement to a position of lower compensation; (2) dismissal allowances for loss of job; (3) reimbursements for expenses incurred in moving families and household effects in order to retain employment with the carrier at another point on its lines; and (4) reimbursements for losses incurred in forced sales of homes below fair value incident to acceptance of employment at a new location.

These conditions are limited in time, by their express terms, to remain in effect for a period of four years from the effective date of the Commission's order authorizing the transactions.[7] Said effective date was fixed by the Commission at forty days after April 7, 1948.[8]

By its original order of April 7, 1948, the Commission authorized the project upon condition, among others, that

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[6] *Id.*, at 782. This later finding was made in answer to a contention by applicants that certain employees, approximately 109 grade crossing watchmen and 9 bridge tenders, were not entitled to receive protection. *Id.* at p. 781.

[7] Exhibit B of the Complaint, p. 1.

[8] 267 I.C.C. 763, 783.

said construction be commenced on or before December 31, 1948, and completed on or before December 31, 1953. By a subsequent order the Commission extended the period of time for commencement and completion of the project to December 31, 1949 and December 31, 1954, respectively, upon a finding that applicants would be unable to commence or complete the authorized construction of the lines of railroad within the time prescribed by the original order.[9]

The Commission's order of April 7, 1948, directs that none of the lines or operations permitted to be abandoned may be abandoned until after operation is substituted over the new lines authorized to be constructed.[10] It is conceded that the overwhelming majority of the employees who will be adversely affected by the project will not be so affected until after the now existing trackage and the five separate terminal stations are abandoned.[11] But the protective conditions by their terms expire in May 1952.

In the light of the foregoing undisputed facts, it was contended by the plaintiff-appellant that since, by applicants' own estimates, "the physical consummation of the project would require four or five years,"[12] imposition of conditions limited in point of time to four years from the effective date of the Commission's order (i.e. May 17, 1952) would effectively nullify such conditions because the period of protection would expire before employees were adversely affected.[13]

Consequently, it was argued that the purported protection would, in fact, amount to no protection under the cir-

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[9] Exhibit D to the Complaint.

[10] Exhibit A to the Complaint, p. 19.

[11] 267 I.C.C. 763 and 778.

[12] The Commission expressly so states in its report, 267 I.C.C. 763 at 778. Now, however, the period for physical consummation is extended an additional year as a result of the authorized extension of time for commencement and completion of the project.

[13] 267 I.C.C. 763, 779.

cumstances of this case, and that such a result would be wholly contrary to both the terms and spirit of Section 5(2)(f) of the Interstate Commerce Act. Accordingly, it was submitted that the period of protection should either date from the time when employees are adversely affected, or the period commencing with the effective date of the Commission's order should be extended, in order to provide some protection in accordance with the basic purpose of the statutory provision when read as a whole.

The Commission, however, concluded that as a matter of law it had no authority to prescribe a period other than one of four years from the effective date of its order.[14]

A petition to the full Commission for reconsideration and modification of this conclusion by Division 4, on the ground that it represented an erroneous construction of the statute provisions of Section 5(2)(f), was denied.[15]

Following denial of its petition for reconsideration to the full Commission, plaintiff-appellant filed a complaint in the United States District Court for the District of Columbia, seeking to set aside that part of the Commission's order asserted to result from an erroneous construction of Section 5(2)(f) of the Interstate Commerce Act. After answer by the defendant and intervening defendants, all parties moved for summary judgment, there being no genuine issue of material facts in dispute. For this reason, the evidence introduced before the Commission was not proffered in evidence before the District Court. The single question presented for determination was whether Section 5(2)(f) of the Interstate Commerce Act requires the Commission to limit all protection of employees adversely affected to a period of four years from the effective date of its order of approval.

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[14] 267 I.C.C. at 782.

[15] Exhibit E of the Complaint.

The case was heard on May 6, 1949, before a three-judge court convened pursuant to the provisions of the revised Judicial Code effective September 1, 1948, Title 28 United States Code, sections 1336, 2325 and 2284.

On May 27, 1949, the District Court rendered its opinion upholding the Commission's construction of the statute, and, having determined that there was no genuine issue of a material fact, granted defendants' motions for summary judgment and dismissed the complaint. The District Court's judgment and decree was entered on June 17, 1949. Copies of the opinion of the District Court and its decree are appended to this Statement.

The Question Presented Is Substantial

The question presented by this appeal is substantial. Although jurisdiction herein is conferred as a matter of right by the aforecited statutory provisions of the revised Judicial Code, it is significant to note that several of the important reasons which guide the Supreme Court in exercising its discretion to grant petitions for *certiorari* are present in this case and attest to the substantial nature of the question presented.

First, the three-judge District Court has decided an important question involving the construction of a federal statute enacted in the interests of the morale and welfare of all railroad employees. The question has not been, but should be, settled by the Supreme Court.

Second, the question has been determined by the District Court in a way probably not in accord with applicable decisions of the Supreme Court and definitely in conflict with basic Congressional intent in providing the legislation embodied in Section 5(2)(f) of the Interstate Commerce Act.

Each of these reasons for regarding the question as substantial will be briefly discussed hereunder.

The issue presented on this appeal was stated by the lower court in these words:

> "The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f) of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that 'the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specification therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f).'"[16]

We have no quarrel with this statement, but on the contrary wish to emphasize its correctness. This action questions the *power* of the Commission to enter an order such as was sought by plaintiff-appellant in this case, and not the propriety of such an order in relation to the facts of the case.

In the light of the issue thus limited, the decision of the Commission affirmed by the lower court is one of far reaching significance. Its import is that *under no conceivable state of evidence in any case* involving a coordination or consolidation transaction by carriers pursuant to Section 5(2) of the Interstate Commerce Act can the Commission grant any protection to employees except that specifically enumerated in the second sentence of Section 5(2)(f) of the Interstate Commerce Act. The protection there afforded is limited in point of time to four years *from the effective date of the Commission's order* approving the coordination transactions.

The fundamental error which plaintiff-appellant asserts is created by such a construction of the statute is that it ignores

[16] Appendix A to this Statement, p. 19.

the basic purpose of Congress in passing the legislation as expressed in the first sentence of Section 5(2)(f) which provides that as a condition to its approval of transactions proposed by railroads under Section 5(2) the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." In effect, the construction which the Commission has made and the District Court has approved in the instant case nullifies the first sentence of Section 5(2)(f) completely and proceeds as though the second sentence was the sole provision of the section.

Not only does such a construction do violence to well established principles of statutory construction, but it creates an inequitable situation in the present case which the language of the statute does not require and which the legislative history of Section 5(2)(f) discloses was certainly not intended by Congress. That inequitable situation is briefly this. It is conceded on the face of the Commission's findings in its Report in this case that the great majority of the employees who will be adversely affected by the transactions authorized will not be so affected until after the period during which the conditions of protection are applicable has expired. This is so because the conditions by their express terms expire in May, 1952, and the abandonments which give rise to the bulk of employee displacements may not be instituted by the carriers until the new construction authorized is completed, which completion the Commission has found cannot be accomplished until sometime in 1954. Neither the Commission nor the District Court have denied the existence of this fundamental inequity. As a matter of fact, the Commission does not even atttempt to answer it, but simply asserts that it is without statutory authority to do anything about the situation. Even the railroad intervenors in their briefs before both the Commission and the District Court conceded that this was so.

Accordingly, the net effect of the Commission's construction of Section 5(2)(f) is that Congress intended to guarantee the benefits of protective conditions to all railroad employees who would be adversely affected by projects which could be physically consummated during the period of four years from the Commission's order authorizing such projects, but that no protection whatever was to be accorded employees who would be adversely affected by projects which could not be physically consummated within such a period. Manifestly, Congress intended no such inequitable or incongruous result. This inequity wholly disappears if the first sentence of Section 5(2)(f) is given the meaning its language purports to grant and if the second sentence of the section is interpreted as establishing a minimum standard only. Under this interpretation, a protective floor is supplied above which the Commission is free to act in requiring a further arrangement for employee protection, of such sort and for such a period as the Commission might consider fair and equitable, in those cases where the facts and circumstances are such that the minimum requirements of the second sentence are insufficient to satisfy the requirement of the first sentence. We see no other way in which both provisions of Section 5(2)(f) can be reasonably construed.

Moreover, this is the only construction consistent with the legislative history of Section 5(2)(f). When the Supreme Court decided *United States* v. *Lowden*, 308 U. S. 225, and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, it examined the legislative history of Section 5(2)(f) and concluded that the purpose of that legislation was simply to make mandatory the protection for workers that had previously been discretionary.[17] This being so, the Commission's interpre-

[17] 308 U. S. 225 at 239; 315 U. S. 373 at 379.

tation is clearly erroneous that the requirements of the second sentence of Section 5(2)(f) preclude its authority to exercise discretion theretofore available to it prior to the passage of the mandatory provisions of Section 5(2)(f).

There is no question that prior to the mandatory provisions of Section 5(2)(f) the Commission had discretion to provide the protection of the Washington Agreement if it so desired, wherein the period of protection commences with the *consummation of the project and the time when the employee is adversely affected* rather than from the effective date of the Commission's order.[18] Furthermore, there is no doubt that the Commission possesses authority to provide such protection, as it afforded in the *Lowden* case, under the abandonment provision of the Interstate Commerce Act [Section 1 (18)-(20)],[19] *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. The bulk of the adverse effects for which protection is sought in this case occurs as a result of authority granted by the Commission under Section 1 (18-20) of this Act, but because of the fact that coordination transactions are also involved the Commission treated the issue of employee protection as subject only to its authority under Section 5(2)(f). Consequently, if the transactions of this case had arisen wholly under the abandonment provisions of the Interstate Commerce Act (where protection to employees is not mandatory) instead of partly under the provisions of Section 5(2)(f), there would be no suggestion that statutory language bars the Commission from requiring protection similar to that granted in the *Lowden* case, which protection would be fair and equitable under the circumstances of this case.

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[18] See *Lowden* v. *United States*, 29 F. Supp. 9, reversed on appeal, 308 U. S. 225, wherein the Commission applied such protection in a consolidation proceeding under Section 5(4) (b) of the Interstate Commerce Act.

[19] 49 U.S.C., § 1(18)-(20).

Accordingly, the particular paradox of the Commission's decision in this case is that its interpretation of the statute necessarily means that what was undeniably available in terms of protection when the Act contained no requirements for protective conditions is now denied by a statutory provision which makes the imposition of an equitable arrangement for the protection of employees mandatory. The ironic character of such a circumstance alone demands a careful appraisal of what Congress really intended when it wrote the several provisions of Section 5(2)(f). We submit that the above-cited decisions of the Supreme Court holding that the legislative history of Section 5(2)(f) reveals merely that Congress intended to make mandatory what was previously discretionary, obviously imply that Congress certainly did not intend to take away employee protection already present. The Commission's construction of Section 5(2)(f) in this case requires us to impute to Congress a policy of adequate protection if this case had arisen wholly under the abandonment section of the Act but no such protection because of the mandatory provisions contained in the second sentence of Section 5(2)(f).[20] If Congress had intended such a distinction, it would have made its intention plain by leaving out the provision contained in the first sentence of Section 5(2) (f). It did not do so.

On the contrary, Congress was careful, as the Supreme Court has held, to continue under the mandatory language of Section 5(2)(f) discretion theretofore available to the Commission *in addition to* requiring certain minimum protection both of kind and extent in time during which it must be provided. This is confirmed by reference to several statements made by proponents of the legislation in both

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[20] *Cf. Interstate Commerce Commisison* v. *Railway Labor Executives' Association*, 315 U. S. 373 at 379-380.

House and Senate during its passage. One such statement which stands out and warrants citation at this time was made by Representative Lea, Chairman of the House Conferees of the Committee which reported the measure which subsequently became Section 5(2)(f) of the Interstate Commerce Act. In explaining the several provisions of Section 5(2)(f) to the House before the legislation was voted upon and adopted, Representative Lea said:

> "The next amendment concerning which the House instructed us was known as the Harrington Amendment. There were certain things involved in the instructions as to this amendment to which I want to call your attention. The first was that the Interstate Commerce Commission should make fair and equitable provisions for employees affected adversely by reason of consolidations or unifications. We had a provision in the original bill that came to the House to that effect and the amendment that we have agreed upon embodies that same provision.
>
> • • • • • • •
>
> "The substitute that we bring in here provides *two additional things.* First, there is a limitation on the operation *of the Harrington amendment* for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not *required* to give them benefits for any longer period. . . .
>
> • • • • • • •
>
> "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. *We take nothing from labor by this agreement.* We simply write *specific provisions that shall be in the order* of approval of the Commission, *but otherwise we do not tie its hands.*" (Emphasis supplied.) [21]

[21] 86 Cong. Rec., Part 9, 77th Cong., 3d Sess., p. 10178.

It is perfectly clear from the foregoing explanation of Section 5(2)(f) that Congress never intended the first provision of Section 5(2)(f) to be meaningless and to preclude the Commission from exercising discretion under the section to provide protection beyond the specific requirements of the second sentence (the Harrington Amendment) in a case where the facts and circumstances were such that such minimum requirements would not provide an arrangement for employee protection which was fair and equitable.

For the foregoing reasons, we submit that the construction of the federal statute involved has been determined by the Commission and the District Court in a way not in accord with applicable decisions of the Supreme Court and contrary to the basic intent of Congress in passing the legislation.

In reaching its conclusions on the issue of statutory construction, the District Court relied in part on certain decisions by the Interstate Commerce Commission which were cited by the Government in its brief to that court.[22] These decisions were cited by the District Court in support of the proposition that the Commission's construction of the statute in the present case is in accord with its prior construction of the statute, and that because of this the instant interpretation is entitled to great weight. There are two reasons why the judgment below to this extent is erroneous.

In the first place, only one of the decisions relied upon has any relevance to the issue in this case. That decision, *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction, etc.*, 257 I. C. C. 292, raised the identical issue here present and was decided by a majority of the Commission adversely to petitioner, Railway Labor Executives'

[22] See Appendix A to this Statement, p. 20, wherein these decisions are cited.

Association, three Commissioners dissenting.[23] It was this decision, and this decision alone, which was relied upon by the Commission in reaching its conclusions in the present case, in which again two Commissoners dissented in the Commission's denial of the Railway Labor Executives' Association's petition for reconsideration. In the other cases cited by the District Court the issue of the proper construction of Section 5(2)(f) was not even raised for the reason that the protection there afforded under the minimum requirements of the second sentence of the section was entirely adequate under the facts and circumstances present in those cases.

In the second place, it was established by the Supreme Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 380, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.[24]

For the foregoing reasons, we submit that the question involved on this appeal is substantial.

Respectfully submitted,

CLARENCE M. MULHOLLAND,
EDWARD J. HICKEY, JR.,
Attorneys for Plaintiff.

Dated August 16, 1949.

Appendix A—Opinion of the District Court.
Appendix B—Judgment and Decree of the District Court.

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[23] 257 I.C.C. 292 at 294. No appeal was taken from the decision. Unlike the present case, the date for completion of the project ran out in 1944 which still left 2 years of protection under the Commission's order. See 257 I.C.C. 292 at 293.

[24] Unlike the present case where the interpretation of Section 5(2)(f) has been reached by the Commission in only one other case, the Commission's construction rejected in the *Railway Labor Executives'* case had been followed in a considerable number of cases.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 646-49

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Plaintiff*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*

Before Clark, Circuit Judge, and Bailey and Pine, District Judges, Sitting as a Statutory Three-Judge Court

PINE, *J.*:

This is an action to set aside, in part, an order of the Interstate Commerce Commission. The defendants are the United States and the Interstate Commerce Commission. The City of New Orleans and certain railroad companies have been granted leave to intervene as defendants. All parties and intervenors have respectively moved for summary judgment. There is no genuine issue of a material fact.

The order involved herein granted the railroad intervenors authority under the Interstate Commerce Act to rearrange their tracks incident to the construction of a Union Passenger Terminal in the City of New Orleans. Plaintiff seeks to set aside that part of the order making provision for protecting the interests of employees adversely affected by the grant of authority.

The total number of employees affected has been estimated at 1022. The number required to operate the Union Passenger Terminal has been estimated at 680. So far as feasible the personnel will be recruited from employees displaced. The estimates indicate a net displacement of from 300 to 350 employees. The physical consummation of the project will require four or five years.

The part of the order to which exception is taken provides as follows:

> "We are of opinion that a fair and equitable arrangement for protecting the interests of employees adversely

affected by the applicants' proposals here will be provided by conditions similar to conditions (4) to (9), inclusive, imposed by us in Oklahoma Ry. Co. Trustees Abandonment, 257 I. C. C. 177 (197-201) which are similar to those prescribed in Chicago, B. & Q. R. Co., Abandonment, supra, and our approval and authorization herein will be granted subject to those conditions."

The order in Oklahoma Railway Co. Trustees Abandonment, referred to, contains the following language:

"The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of four years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order."

The statute under which the order was made is Section 5(2)(f) of the Transportation Act of 1940,[25] and so far as material, reads as follows:

"As a condition of its approval . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded . . . shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

---

[25] 49 U.S.C.A. 5(2)(f).

Plaintiff contends that the four-year period specified in the statute fixes the minimum period of employee protection, leaving the Commission with discretion to extend such period, and proposed before the Commission that the protection should continue for at least four years from the time employees shall be adversely affected, it being plaintiff's position that the order involved herein provides no protection whatever to employees who will be adversely affected by authorized transactions which will not be completed until after the protected period prescribed has expired. Defendants contend that the language plainly does not authorize the Commission to prescribe any protective period, other than a "period of four years from the effective date" of the Commission's order of approval, the only qualification being in the case of employees of less than four years employment, where the protective period cannot be longer than the employees' prior employment.

The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f) of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that "the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specification therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f)."

In our view the language of the statute in question is clear and unambiguous and the Commission's interpretation is correct. The first sentence thereof provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence prescribes the standard for such arrangements, namely that they shall be such that the employees will not be placed in a worse position with respect to their employment, and then proceeds to limit the time of such protection, namely four years from the effective date of the approval order. In addition, this interpretation is in accordance with the Commission's prior construction of

the statute,[26] and on that account is entitled to great weight. Finally, the legislative history set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute.

We are therefore of the view that the actions for summary judgments filed by the defendants should be granted and the complaint should be dismissed.

Counsel will submit appropriate order.

(S.) BENNETT CHAMP CLARK,
Circuit Judge.

(S.) JENNINGS BAILEY,
District Judge.

(S.) DAVID A. PINE,
District Judge.

May 27, 1949.

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[26] Texas & Pac. Ry. Co. et al. Operation, etc. (1941), 247 I. C. C. 283, 295, 296.

Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al., Construction etc. (1942), 252 I.C.C. 49, 66; 252 I.C.C. 287; 257 I.C.C. 292.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 646-49

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Plaintiff*,

v.

UNITED STATES OF AMERICA, ET AL., *Defendants*

JUDGMENT, ORDER AND DECREE

This cause came on to be heard on the 6th day of May, 1949, on an action to set aside in part an order of the Interstate Commerce Commission, and all parties and intervenors having moved for summary judgment, there being no genuine issue of a material fact, and the Court having heard the arguments of counsel for all parties, and the Court having considered the matter and being fully advised in the premises, and having concluded, found and determined that the motions for summary judgment filed by the defendants should be granted and the complaint dismissed.

It Is Hereby Ordered, Adjudged and Decreed that the motions for summary judgment filed by the defendants, be and they are hereby granted, and the complaint is hereby dismissed with prejudice at plaintiff's costs.

This 17th day of June, 1949.

(S.) BENNETT CHAMP CLARK,
Circuit Judge;

(S.) JENNINGS BAILEY,
District Judge;

(S.) DAVID A. PINE,
District Judge.

Seen:

(S.) EDWARD J. HICKEY, JR.,
Attorney for Plaintiff;

(S.) DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission;

(S.) W. S. MACGILL,
Attorney for Railroad Intervenors.

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No. 337

IN THE

Supreme Court of the United States

October Term, 1949

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

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IN THE

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On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

OPINION BELOW

The opinion of the specially constituted district court (R. 69) is reported in 84 F. Supp. 178. The report of the Interstate Comerce Commission (R. 10) is published in 267 I. C. C. 763.

JURISDICTION

The judgment and decree of the three-judge district court was entered on June 17, 1949 (R. 72). Petition for appeal was presented and allowed on August 16, 1949 (R. 73-74). The jurisdiction of this Court is invoked under the Judicial Code as revised by the Act approved June 25, 1948, effective September 1, 1948, entitled Title 28, U. S. Code, Sections 1253 and 2101(b). Probable jurisdiction was noted on October 24, 1949 (R. 80).

QUESTION PRESENTED

This is a case in which because of an alleged statutory time limitation an overwhelming majority of railroad employees to be dismissed and displaced from employment as a result of carrier coordination transactions will receive no protection of the sort Congress sought to provide by Section 5(2)(f) of the Interstate Commerce Act,[1] and the single question presented is whether that section of the Act requires the Commission as a matter of law to limit all protection of employees to a period of four years from the effective date of its order approving the transactions. More particularly, the question raised is whether the specific requirements of the second sentence of Section 5(2)(f) of said Act preclude the Commission from exercising any discretion under the first sentence of said section with respect to the extent in time of employee protection.

STATUTE INVOLVED

The statutory section involved in this case is Section 5(2)(f) of the Interstate Commerce Act, 54 Stat. 906, 49 U. S. C. §5(2)(f), which provides as follows:

[1] Herein sometimes referred to as the Act.

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

STATEMENT

In this case the Commission has approved a project nder Section 5(2) of the Interstate Commerce Act which oncededly cannot be completed until sometime in 1954. The great majority of employee dismissals and displacements arising as a result of the project will not occur until fter such completion. The Commission has imposed conitions required by law, purportedly for the protection of ll employees to be dismissed and displaced, which expire y their terms in May 1952. Accordingly, only a few of he employees will receive any protection. The Commission has held that it has no authority under Section 5(2)(f) f the Interstate Commerce Act to extend the period of rotection beyond four years from the effective date of its rder approving the project, i.e., May 17, 1952. The facts iving rise to this situation are as follows:

On November 21, 1947, the City of New Orleans, Louisiana, which, through the agency of its Public Belt Railroad Commission, owns and operates a belt line of railroad, together with certain common carriers by railroad (intervening appellees herein), filed a joint application with the Interstate Commerce Commission for approval of certain proposed transactions. Authority was sought to construct and acquire certain lines of railroad, to jointly own or use lines of railroad, and to abandon certain other lines or operations—all as necessary incidents to the construction of a new railroad passenger terminal at New Orleans and the removal within that city of certain trackage for the purpose of eliminating undesired grade crossings (R. 11-12).

The Railway Labor Executives' Association, appellant herein, intervened in the Commission proceeding as a representative of the interests of the employees of the railroad carriers involved (R. 11). It did not oppose the project, but it urged that if the requested authorizations were granted, they be made subject as required by Section 5(2)(f) of the Interstate Commerce Act,[2] to a fair and equitable arrangement for the protection of railroad employees adversely affected by the transactions (R. 28).

After hearing, Division 4 of the Commission on April 7, 1948, entered its report and order authorizing the proposed transactions (R. 10, 41).

From its review of the evidence of record, the Commission found that employees definitely would be adversely affected by applicants' proposals (R. 32). It did not attempt to state the exact number of employees who ultimately would be affected, but relied upon estimates by a committee of transportation officers that, based on present day conditions, approximately 1022 employees would be affected. How many of that total number will eventually

[2] 54 Stat. 906, 49 U. S. C. § 5(2)(f).

be displaced to positions of less compensation and how many will be dismissed outright is not now known, but it was further estimated that if the manager of the new terminal recruits necessary personnel from employees displaced at the now existing five separate terminals to be abandoned upon completion of the new terminal, between 300 and 350 employees would eventually lose their jobs (R. 27). The Commission also stated that it was admittedly impossible, at the time of its order, to ascertain the identity of the estimated number of employees who would be released from service or otherwise adversely affected when the project was completed (R. 30).

Because of its finding that employees definitely would be adversely affected, the Commission concluded that it was required to provide "a fair and equitable arrangement to protect the interests of employees so affected" and further found that "the benefit of such arrangement necessarily must extend to all the railroad employees affected by the exercise of the authorizations herein granted." (R. 32).[3]

Accordingly, the transactions proposed were approved subject to certain conditions required by Section 5(2)(f) of the Interstate Commerce Act, which purportedly were provided for the protection of all railroad employees who would later be adversely affected as a result of the project.

The specific protective conditions imposed are not set forth in the Commission's report, but are incorporated herein by reference to a previous Commission decision[4] wherein they are specifically enumerated (R. 32-33). These conditions are set forth in Exhibit B to the Complaint

[3] This later finding was made in answer to a contention by applicants that certain employees, approximately 108 grade crossing watchmen and 9 bridge tenders (R. 27), were not entitled to receive protection (R. 31-32).

[4] *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, 197-201.

(R. 43-48). They represent a system of compensatory allowances which by their terms are operative if and when an employee is adversely affected as a result of the transactions authorized by the Commission, and may be summarized as follows:

In the event an employee is *displaced*, i.e., required to accept a less desirable job, he must be paid a monthly allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation previously received in the position from which he was displaced. The compensation due is determined by a formula prescribed in detail and applied so as to preserve pension or annuity rights as well as other employee privileges such as seniority rights. The benefits thus conferred are limited in time from the date on which the employee is displaced to the expiration of 4 years from the effective date of the Commission's order,[5] provided that such protection shall not continue for a longer period than the period of the employee's service with the carrier prior to the effective date of the Commission's order (R. 44).

In the event an employee is *dismissed* from employment as a result of the abolition of his position by the carrier pursuant to the transactions approved, or the loss of employment due to the exercise of seniority rights by another employee whose position is abolished,[6] he is entitled to receive a monthly dismissal allowance, based on average earnings during the last 12 months of his employment prior to dismissal, for the same protective period as the displaced employees, subject, however, to reduction by amounts earned in other employment, and subject also to the requirement that the dismissed employee must accept employment offered under certain conditions by any of the carriers involved (R. 44-45).

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[5] Referred to as the "protective period".

[6] Commonly referred to as "bumping".

The conditions further provide for the preservation dur-ng the protective period of certain rights and benefits ttaching to the previous employment from which the em-loyee is displaced or dismissed, such as free transporta-ion, pensions, hospitalization, reimbursements for moving xpenses of displaced employees, and reimbursements for osses with respect to the sale or disposition of an em-loyee's home (R. 45-47).

The foregoing conditions have been limited in time, by heir express terms, to expire four years *from the effective late of the Commission's order of approval in this case.* Said effective date was fixed by the Commission at forty lays after April 7, 1948 (R. 43), i.e., May 17, 1948.

By its original order of April 7, 1948, the Commission uthorized the project upon the express condition, among thers, that the construction of the new lines of railroad e commenced on or before December 31, 1948, and com-leted on or before December 31, 1953 (R. 42). By a ubsequent order of November 22, 1948, the Commission xtended the period of time for commencement and com-letion of the project to December 31, 1949, and December 1, 1954 (R. 51), respectively, upon representation by the arriers that they would need another year in which to ommence construction of the new terminal (R. 49), and pon a finding that applicants would be unable to com-nence or complete the authorized construction of the lines f railroad within the time prescribed by the original rder (R. 50-51).

The Commission's order of April 7, 1948, further directs that none of the lines or operations herein permitted to e abandoned may be abandoned until operation is sub-tituted over lines herein authorized to be constructed, ac-uired, or jointly used or owned." (R. 42). It is clear hat the overwhelming majority of the employees who ill be adversely affected by the project will not be so ffected until after the now existing trackage and the five eparate terminal stations are abandoned (R. 27), now

sometime in 1954. But the protective conditions by their terms expire in May 1952.

In the light of the foregoing undisputed facts, it was contended by the appellant that since, by applicants' own estimates, "physical consummation of the project will require four or five years,"[7] imposition of conditions limited in point of time to four years from the effective date of the Commission's order (i.e., May 17, 1952) would effectively nullify such conditions because the period of protection would expire before employees were adversely affected (R. 29).

Consequently it was argued that the purported protection would, in fact, amount to no protection under the circumstances of this case, and that such a result would be wholly contrary to both the terms and spirit of Section 5(2)(f) of the Interstate Commerce Act. Accordingly, it was submitted that the period of protection should date from the time when employees are adversely affected in order to provide some protection to employees in accordance with the basic purpose of the statutory provision when read as a whole (R. 30).

Although the Commission determined that it was appropriate to require a fair and equitable arrangement to protect the interests of all the railroad employees affected by the authorizations granted, it concluded that as a matter of law it had no authority to prescribe a period other than one of four years from the effective date of its order (R. 22).

A petition to the full Commission for reconsideration and modification of this conclusion by Division 4, on the ground that it represented an erroneous construction of the provisions of Section 5(2)(f), was denied (R. 51).

---

[7] The Commission expressly so states in its report (R. 28). Now, however, the period for physical consummation is extended an additional year as a result of the authorized extension of time for commencement and completion of the project (R. 51).

Following denial of its petition for reconsideration to he full Commission, appellant filed a complaint in the 'nited States District Court for the District of Columbia, eeking to set aside that part of the Commission's order sserted to result from an erroneous construction of Sec- ion 5(2)(f) of the Interstate Commerce Act (R. 1). After nswer by the defendant (R. 53) and intervening defend- nts (R. 57, 60), all parties moved for summary judgment, here being no genuine issue of a material fact in dispute R. 65-68). For this reason, the evidence introduced be- ore the Commission was not proffered in evidence before he District Court. The single question presented for de- ermination was whether Section 5(2)(f) of the Interstate 'ommerce Act requires the Commission to limit all pro- ection of employees adversely affected to a period of four ears from the effective date of its order of approval R. 71).

The case was heard on May 6, 1949, before a three-judge ourt convened pursuant to the provisions of the revised udicial Code effective September 1, 1948, Title 28 United States Code, Sections 1336, 2325, and 2284.

On May 27, 1949, the District Court rendered its opin- on upholding the Commission's construction of the stat- te, and, having determined that there was no genuine ssue of a material fact (R. 69), granted defendants' notions for summary judgment and dismissed the com- plaint. The District Court's judgment and decree was ntered on June 17, 1949 (R. 72).

SPECIFICATION OF ERRORS

Appellant relies upon each of the errors enumerated n its Assignment of Errors (R. 75-77), and in particular rges that the District Court erred:

1. In holding and concluding that under Section 5(2)(f) f the Interstate Commerce Act the Interstate Commerce Commission has no authority to provide any other period

of protection than one of four years from the effective date of its order.

2. In failing to hold and conclude that although the Commission is required by the said Section 5(2)(f) to provide a period of protection of at least four years from the effective date of its order, it is not precluded by that section from providing a longer period if the facts and circumstances of a particular case require such longer period in order to provide a fair and equitable arrangement for the protection of employees.

3. In failing to hold and conclude that although the second sentence or provision of the said Section 5(2)(f) states a minimum protection both of type and extent in time which the Commission must provide, the section as a whole does not require the acceptance of said minimum provision as the maximum protection which may be authorized.

4. In construing the said Section 5(2)(f) in such manner as to bring about an inequitable, unreasonable, and unintended result contrary to the basic purpose and intent of Congress in providing the legislation.

SUMMARY OF ARGUMENT

I.

The issue in this case is solely one of construing the extent of the Commission's authority to provide protection for employees under Section 5(2)(f) of the Interstate Commerce Act. As interpreted by the Commission, the statute gives it no authority, regardless of the merits or its desires in a particular case, and under no conceivable state of evidence, to provide any other period of protection than one of four years from the effective date of its order. This is a time limitation which admittedly governs the specific requirements of the second sentence of Sec-

tion 5(2)(f), but which the Commission contends also governs its authority under the section as a whole.

The Commission's construction of the statute creates in this particular case a patently inequitable result which its language does not require, and which is repugnant to a common sense interpretation of Congressional intent. That inequitable situation is briefly this. It is undisputed that the overwhelming majority of employees who will be adversely affected by the approved transactions will not be so affected until after the period during which the conditions are applicable has expired. The protective conditions by their express terms expire in May, 1952, but the bulk of employee dismissals and displacements will not occur until after the completion of the project, which the Commission has found cannot be accomplished until sometime in 1954. For this reason, appellant requested that the period of protection date from the time of the adverse effects, which was the period provided by the Commission in *United States* v. *Lowden*, 308 U. S. 225.

The manifest purpose of Section 5(2)(f) was to provide railroad employees dismissed and displaced from their jobs as a result of carrier coordination transactions with a period of financial assistance, by way of compensatory allowances, during which to readjust themselves. The reason is readily apparent from a reading of this Court's decisions in *United States* v. *Lowden*, 308 U. S. 225 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. There it was established that protection of the morale and welfare of the railroad employee was an acknowledged part of the public interest in maintaining an adequate and efficient transportation system. Since, as this Court held in the cited cases, this protection was available to the Commission to provide without express language to that effect, it was obviously not the purpose of Section 5(2)(f) to take it away. That section is interpreted here as requiring a decision which merely gives the great majority of em-

ployees "notice" that four or five years hence their jobs might be placed in jeopardy. Such a construction would destroy morale and welfare, not aid it.

We contend that the Commission's construction of the statute and that of the District Court are erroneous not only from the standpoint of accepted rules of statutory construction but also in the light of the legislative history of the statutory provisions in question.

II.

The language of Section 5(2)(f) clearly gives the Commission discretion to provide protection beyond the minimum requirements of its second sentence.

On its face, the first sentence of the section plainly vests discretion in the Commission to determine what will constitute fair and equitable protection. This provision makes mandatory a fair and equitable arrangement, but leaves to the Commission's discretion the nature and extent in time of the particular type of protection to be afforded.

The second sentence does not provide the standards for the first sentence as held by the District Court, but provides specific protection both of type and extent which the Commission is required to impose. The specific type of protection is that the employee shall not be in a "worse position" with respect to his employment, and the extent in time this type of protection is required is four years from the effective date of the Commission's order, with a proviso that a longer period shall not be required than the period during which the employee was in the service of the carrier prior to the effective date of the Commission's order. But the time limiting language of the proviso is carefully restricted to the second sentence alone and does not apply to the section as a whole.

We contend that the specific requirements of the second sentence, which include the only reference of the section

to a four year period, constitute *minimum* requirements below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence but beyond which it is free to act if the circumstances of a particular case require a more extended period. To construe the section otherwise would make surplusage of the first sentence and violate the well established principle that a statute should be so construed that no clause, sentence, or word will be superfluous, void, or insignificant, and each part should be interpreted so as to make all provisions harmonize. *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116; *Ex Parte Public Bank*, 278 U. S. 101, 104; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *Markham* v. *Cabell*, 326 U. S. 404, 409. As the Commission and the lower court interpret Section 5(2)(f) however, the second sentence nullifies the first because the Commission claims it has no discretion but to follow the specifications of the second provision alone.

The net effect of the Commission's construction is that Congress intended to guarantee the benefits of protective conditions to all railroad employees who would be adversely affected by projects which could be physically consummated during the period of four years from the Commission's order authorizing such projects, but that no protection whatsoever was to be accorded employees who would be adversely affected by projects which could not be physically consummated within such a period. Manifestly, Congress intended no such inequitable or incongruous result. *Cf. American Trucking Assn.* v. *United States*, 310 U. S. 534, 542; *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C. C. A. 2d) aff'd 326 U. S. 404, 409.

III.

The legislative history of Section 5(2)(f) confirms the foregoing construction of the statute. The first and second sentences of the section had entirely different origins and

objectives, and when finally embodied within the statute, distinct meanings and purposes.

The first sentence was introduced with the objective of giving legislative assurance of a continuance of the type of protection provided by the Washington Job Protection Agreement, which the Commission had previously afforded under its discretionary powers. *United States* v. *Lowden*, 308 U. S. 225, 239; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 379. That such was its minimum purpose is clearly evident from repeated statements by the legislative framers of the provision that its language sought not only to guarantee the protection gained by the Washington Agreement and approved by this Court in the *Lowden* case, but also to provide "the possibility of gaining further rights by collective bargaining or by action of the Interstate Commerce Commission."

The objective of the second sentence of Section 5(2)(f), known as the Harrington amendment, was entirely different. As originally introduced it sought to protect "the railroad worker against any unemployment or any impairment of employment rights"—the very adversity which the first sentence clearly contemplated would ensue as a natural result of coordination transactions, and which it sought to mitigate by providing a period of financial assistance within which the railroad employee could readjust himself. The violent opposition which this second provision encountered, unlike the first on which railroad management as well as railroad labor were united, finally resulted in a compromise provision which insured the employee from being placed in a "worse position" with respect to his employment, but limited the requirement of such type of protection to four years from the effective date of the Commission's order approving the transactions. At no time was this provision designed to subtract from or circumscribe benefits available under the first provision. On the contrary it was pointedly described as providing "further protection".

The men of Congress who actually drafted the final measure as it now appears in the Interstate Commerce Act described its provisions as stated above. The final conference report clearly indicates that the time limitations of the section apply only to the requirements of the second provision. After first discussing the first sentence as a separate provision which the conferees had retained, the report included the following explanation with respect to the retention of the requirements of the second sentence:

> ". . . The conference agreement, however, qualifies *this provision* by confining *its* operation to a period of four years from the effective date of the order approving the transaction . . ." (Italics supplied)

Finally, as if to remove all doubt of the continuance of Commission discretion beyond the specific requirements of the second sentence, Representative Lea, Chairman of the House conferees, in concluding his explanation of the intention of the conference committee to the House, stated:

> "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write *specific provisions that shall be in the order* of approval of the Commission, *but otherwise we do not tie its hands.*" (Italics supplied.) [8]

The entire legislative history is devoid of a suggestion by anyone at any time that the type and extent in time of protection which the carriers and labor had voluntarily

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[8] *Cf. Railway Labor Executives' Association* v. *United States*, 38 F. Supp. 818, 823-824; aff'd 315 U. S. 373, where Chief Judge Groner observed:

> "These discussions [the legislative history of Section 5(2)(f)] resulted only in the enactment of a provision requiring a 'fair and equitable arrangement' to protect employees in consolidation cases *and other more specific provisions therefor.*" (Italics supplied.)

agreed to in the Washington Agreement, the continuance of which Congress had sought to insure by the statutory language of the first sentence, was to be limited or nullified by the specific requirements of the Harrington amendment which, as modified, is now embodied in the second sentence of Section 5(2)(f).

IV.

The District Court's conclusion that the Commission's construction of the statute is entitled to great weight is without merit. In the first place, in only one of the four Commission decisions relied upon by the lower court in support of this conclusion was the issue presented by this case raised or discussed. In that decision, *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction*, 257 I. C. C. 292, three Commissioners dissented. In the second place, it was established by this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 380, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.

V.

The Commission's construction of Section 5(2)(f) in this case is directly contrary to interpretation of the intent of the statute in previous decisions of this Court. Here the Commission asserts it is powerless under mandatory provisions to provide protection which it did provide under its discretionary power prior to the enactment of Section 5(2)(f). This Court has already determined, however, that the purpose of Section 5(2)(f) was simply to make mandatory the protection for workers that had previously been discretionary. *United States* v. *Lowden*, 308 U. S. 225, 239; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 379.

Moreover, the Commission undeniably possesses under the abandonment provisions of the Interstate Commerce Act authority to provide the very protection sought by appellant in this case and afforded by it in the *Lowden* case. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. Accordingly, the Commission's negation of authority under Section 5(2)(f) means that what was available in terms of protection when the Interstate Commerce Act contained no requirements for protective conditions is now denied by a statutory provision which makes the imposition of an equitable arrangement for the protection of employees mandatory. Clearly, Congress intended no such incongruous result or inconsistency of statutory policy.

ARGUMENT

I.

Analysis of Commission's Decision and Summary of Appellant's Position.

The Commission's decision in this case on the issue of employee protection is wholly one of construing the extent of its authority under Section 5(2)(f) of the Interstate Commerce Act.[9] The Commission makes no attempt to reach a decision on the merits of the controversy. In fact, as shown by the relation of the facts of the case in the Statement above, a fair reading of the Commission's report clearly indicates the existence of a patently inequitable situation about which the Commission asserts it is powerless under the statute to do anything. The narrowness of the issue thus presented was recognized by the court below when it said:

> "The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f)

[9] 54 Stat. 906, 49 U. S. C. § 5(2)(f).

> of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that 'the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specification therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f).' " [10]

In the light of the issue thus limited, the legal conclusion of the Commission affirmed by the court below is one of far reaching significance. It simply means that under no conceivable state of evidence in any case involving a coordination or consolidation transaction subject to approval under Section 5(2) of the Interstate Commerce Act can the Commission grant any protection to employees except that specifically required by the second sentence of Section 5(2)(f) of the Act. Such protection is limited in point of time to four years *from the effective date of the Commission's order of approval.*

The particular irony of this restricted construction of Section 5(2)(f), as will be developed in more detail later herein, is that it denies the existence of authority under mandatory provisions of the Act to provide protection, required by the circumstances of this case, which this Court has held the Commission clearly possessed when no such mandatory provisions existed in the Act,[11] and also which this Court has held the Commission possesses under the abandonment provisions of the Act,[12] where employee protection is discretionary but not required.[13] We feel that such a circumstance alone is a persuasive indication

[10] R. 71.

[11] *United States* v. *Lowden*, 308 U. S. 225, wherein the Commission imposed protective conditions extending in point of time for five years *from the date when the employee was adversely affected.*

[12] 49 U. S. C. § 1(18)-(20).

[13] *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373.

that Congress intended no such construction of the statute as has been made in this case.

Not only does the Commission's construction of the statute do violence to a common sense interpretation of Congressional intention, but it creates in this particular case an inequitable situation which the language of the statute does not require. That inequitable situation is briefly this. It is undisputed that the overwhelming majority of the employees who will be adversely affected by the approved transactions will not be so affected until after the period during which the conditions of protection are applicable has expired.[14] This is so because the conditions by their express terms expire in May, 1952, and the abandonments which give rise to the bulk of employee dismissals and displacements may not be instituted by the carriers until the new construction, acquisitions, etc., are accomplished (R. 42), which the Commission has found cannot be completed until sometime in 1954 (R. 50-51).

Aside from its asserted lack of statutory power, the Commission's sole answer to the inequitable result which will follow from its construction of the statute is its half-hearted suggestion that although "admittedly it is impossible at this time to determine the employees who will be released from service or otherwise affected adversely when the project is completed, . . . by comparison of seniority lists and the number of jobs affected, an employee could obtain some idea whether his employment would be placed in jeopardy, assuming no change in general conditions." (R. 30). The short answer to this suggestion is that even if true this is not the protection Congress sought to provide by Section 5(2)(f). As will become clear upon examination of the legislative history, *infra*,

[14] The railroad intervenors in their briefs before both the Commission and the District Court conceded that this was so by the statement: "It has been shown that the passenger terminal will not be ready for operation for four or five years and that only a few of the employees will be displaced or dismissed prior thereto."

Congress sought to give railroad employees legislative assurance that in the event of job dismissals and displacements due to coordination transactions, they would receive protection in the form of compensatory allowances in order that they might economically adjust themselves. This was the only type of protection which the Commission had afforded under its discretionary powers prior to the enactment of Section 5(2)(f), and it was this protection which Congress sought to continue by making it mandatory. *United States* v. *Lowden*, 308 U. S. 225, 239; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 379. The reason is readily apparent from a reading of this Court's decisions in the cited cases. Protection of the morale and welfare of the railroad employee was an acknowledged part of the public interest in maintaining an adequate and efficient transportation system. Obviously, that morale and welfare is not served, nor was it ever intended by Congress to be served, merely by giving an employee "notice" that four or five years hence his job might be placed in jeopardy. Such a purpose would destroy morale and welfare, not aid it.

If there is any doubt that the purpose of the statute was to provide a system of compensatory allowances, when and if needed, it is resolved upon examination of the very conditions imposed by the Commission in this case (R. 43-48). They are applicable by their express terms if, and only if, an employee is displaced or dismissed from his employment as a result of coordination and abandonment transactions undertaken by the carriers.[15] Accordingly, their purpose can only be to provide employees with a period of financial assistance within which to adjust themselves to the economic calamity of job dismissals and displacements—a need which arises only upon actual impact of job loss or displacement. Since this is the only

[15] See the summary discussion of the nature of the conditions imposed, *supra* pages 6-7.

protection even purported to be provided by the Commission, it is idle to talk of protection in terms of notice.

Moreover, even if we accept, *arguendo*, the notion of "notice" over a four year period as protection for employes, as a practical matter there is no such notice in this case. There is no possible way for an employee now to determine whether four or five years hence his job will be in jeopardy. This is so, in part, because of deaths, retirements, resignations and the like which completely alter the seniority status of a man, which seniority fixes his rights to job entitlement at the time of layoffs and job changes. In part, it is also due to the fact that none of the present employees at the five separate terminals to be abandoned could conclude with any degree of certainty whether they or others would be recruited for employment by the new company upon completion of the passenger terminal. Until the new terminal is completed, the only indication these employees will have as to their future job status is that "so far as feasible" an estimated, but unidentifiable, number will be reemployed. It is readily apparent that such a qualification makes it quite impossible for an employee now to even estimate his chances of dismissal or retention. For example, certain of the employees with senior status might be unqualified to meet technological changes in the operation of the new terminal. More employees may be taken from one of the present terminals than from another. Such examples could be multiplied. Furthermore, it is foolhardy to presume no change in general conditions on the railroads over an extended period of five years. If an employee were to resign now to accept another job on the assumption that general conditions being the same he would probably be laid off five years hence, and any one of a number of factors changed the picture so that in fact he would not have been dismissed from employment, such employee would needlessly sacrifice valuable rights to retirement pensions as well as a good job. If, on the other hand, an

employee depending upon a stabilization for the next five years of general conditions as they now exist, concluded that his position of employment was secure, and general conditions in the railroad industry or in the New Orleans district deteriorated, such an employee would still be released with no protection of the sort Congress sought to provide by the provisions of Section 5(2)(f). Obviously, the suggestion that the Commission's order gives an employee four years notice is of no validity in this proceeding.

Consequently, the decision in this case is reduced to a simple conclusion of law that regardless of the lack of equity in the "protection" here afforded, the Commission has no authority under the statute to provide any other. The Commission so concludes in its report wherein, in speaking of the fair and equitable arrangement which it is directed by statute to require to protect the interests of all railroad employees adversely affected, it states (R. 32):

> "We think that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorizations herein granted. But we also think that the fair and equitable arrangement contemplated by section 5(2)(f) is measured by the specification therein of a protective period of 4 years from the effective date of our order approving a transaction within the scope of section 5(2). As was decided in *Chicago, M., St. P. & P. R. Co. Trustees Construction, supra*, we have no authority to prescribe any other period." [16]

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[16] In *Chicago, M. St. P. & P. R. Co. Trustees Construction*, 257 I. C. C. 292, the majority of the Commission (three Commissioners dissenting) held:

> "Section 5(2)(f) prescribed a definite period of protection, namely, 'four years from the effective date of such order'. In our opinion, we have no authority to prescribe any other period in a case arising under section 5(2)."

The Commission's decision in this case—the only other Commission decision involving the issue presented on this appeal—was not appealed to the courts, probably for the reason that the period of protection there, unlike in this case, would not wholly expire before the overwhelming majority of employees would be adversely affected.

The District Court agreed with the foregoing construction of the statute, and assigned the following three grounds as the basis of its decision (R. 71-72):

1) Section 5(2)(f) is clear and unambiguous in that the first sentence provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected; and the second sentence provides the standard for such arrangements, including a limitation of four years from the effective date of the approval order.
2) This interpretation is in accord with the Commission's prior construction of the statute,[17] and on that account is entitled to great weight.
3) The legislative history of Section 5(2)(f) set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute.

It is our position that the Commission's construction of Section 5(2)(f) is erroneous, and that both the well accepted rules of statutory construction and the legislative history of the provisions in question clearly establish an intent by Congress contrary to that attributed by the Commission. It is our further position that each of the grounds advanced by the District Court in support of its decision are erroneous. It will be our purpose to develop the argument herein with specific reference to each of these grounds of decision.

II.

The Language of the Statute Clearly Gives the Commission Discretion to Provide Protection Beyond the Minimum Requirements of the Second Provision of Section 5 (2)(f).

For the convenience of the Court in following the argument to be advanced in this section, we repeat the

[17] Here the District Court relied upon four cases, only one of which we contend involved the issue here presented.

language of the first and second provisions of Section 5(2)(f):

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

On its face, the first sentence of the section plainly vests discretion in the Commission to determine what will constitute fair and equitable protection for employees. This provision makes mandatory a fair and equitable arrangement for the protection of employee interests adversely affected, but leaves to the Commission's discretion the determination of the nature and extent in time of the particular type of protection to be afforded—unquestionably to be judged in the light of the circumstances of particular cases presented.

The second sentence of the section provides specific protection both of type and extent in time which the Commission is *required* by positive language to impose. The reason we say this language requires protection of a specific *type* is that it guarantees that an employee will be in no "worse position" with respect to his employment. Such protection is also limited in time to four years from the effective date of the Commission's order. But there is no language in this second sentence which purports to

nullify the language of the first sentence, under which the Commission certainly has discretion to provide a period of protection other than one of four years from the effective date of its order. For this reason we contend that the second sentence constitutes a *minimum standard* below which the Commission may not go in providing a fair and equitable arrangement for the protection of employees adversely affected, but beyond which it is free to act if the circumstances of a particular case require a more extended period.

We submit that this construction of the language of the second sentence is substantiated by the proviso of the second sentence which states:

> ". . . except that the protection afforded to any employee *pursuant to this sentence* shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order." (Italics supplied.) [18]

Congress did not say that the protection afforded by the *section* shall not be required to continue for more than the four year period. It used the qualifying words "pursuant to this sentence". This is a further indication that Congress was thinking in terms of a minimum requirement when it wrote the second sentence of the section, and that it did not intend to divest the Commission of all discretion under the section as a whole with respect to the extent in time of employee protection. If the intention of Congress in writing Section 5(2)(f) had been to limit all protection available thereunder to a period of four years from the effective date of the Commission's order, it could easily have said so in unmistakable terms. The fact that it did not do so, but carefully prescribed the limitation

[18] Unfortunately, the District Court omitted the qualifying language here italicized in its quotation of the statute (R. 70).

as applicable only to the positive requirements of the second sentence, is persuasive evidence that it intended the first sentence of the section to have meaning and purpose and not to be wholly circumscribed, as held by the District Court, by the provisions of the second sentence. Moreover, the extended legislative history of the origin and entirely distinct purposes of the first and second sentences of Section 5(2)(f), which will be discussed later herein, is convincing evidence that the restriction of the four year period to the second sentence rather than to the section as a whole was purposeful and not inadvertent.

As the Commission interprets the first and second provisions, however, the second nullifies the first because the Commission claims it has no discretion but to follow the specifications of the second provision alone. Unless we assume that Congress in enacting Section 5(2)(f) included the first provision thereof for no purpose, the construction urged by the Commission and the District Court in this case must be rejected. *Cf. Chicago, M., St. Paul & Pac. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U. S. 465, 472; *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764. Possibly no principle of statutory construction is better established than the cardinal rule that a statute ought to be so construed that, if possible, no clause, sentence or word shall be superfluous, void, or insignificant. The equally well established corollary rule is that every part of a statute must be construed in connection with the whole, so as to make all of the parts harmonize, and thus accord meaning to each. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116; *Ex Parte Public Bank*, 278 U. S. 101, 104; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *Markham* v. *Cabell*, 326 U. S. 404, 409.

This rule of statutory construction requires that both provisions of Section 5(2)(f) be construed together in such manner as to give proper effect to each. If the second provision is construed as establishing the only protection available under the section, it is submitted that this

rule will be violated in that the first provision will in effect be read out of the statute. Accordingly, as noted above, since the second provision of the section is mandatory as to type of protection to be afforded, it undoubtedly was intended to state a minimum standard of employee protection. If it is construed as stating a maximum as well, then inasmuch as it would provide both maximum and minimum it would state the *only* protection which the Commission might impose and thus would completely do away with any reason for the presence of the first provision in the statute. *Cf. Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764. Obviously this leads to an absurd and unreasonable result, and as will later be shown, one clearly at variance with the legislative intent and policy at the time Section 5(2)(f) was enacted. *Cf. American Trucking Association* v. *United States*, 310 U. S. 534, 542; *Markham* v. *Cabell*, 326 U. S. 404, 409.

The net effect of the Commission's construction is that Congress intended to guarantee the benefits of protective conditions to all railroad employees who would be adversely affected by projects which could be physically consummated during the period of four years from the Commission's order authorizing such projects, but that no protection whatever was to be accorded employees who would be adversely affected by projects which could not be physically consummated within such a period. Manifestly, Congress intended no such inequitable or incongruous result. The inequity wholly disappears if the first provision of Section 5(2)(f) is given the meaning its language purports to grant and if the second provision of the section is interpreted as establishing a minimum standard only. We see no other way in which both provisions of Section 5(2)(f) can be reasonably construed.[19]

[19] *Cf.* the reasoning of Judge Learned Hand in *Cabell* v. *Markham*, 148 F. 2d 737 at 739 (C. C. A. 2d), aff'd 326 U. S. 404.

III.

The Legislative History of Section 5(2)(f).

To a substantial extent the answer to this case appears to us to lie in a proper understanding of what objectives Congress sought to accomplish when it wrote the first and second sentences of Section 5(2)(f). Each of these provisions had a different origin and purpose, and we believe a complete appreciation of the history of the provisions will contribute materially to the problem of statutory construction now before the Court. In thus seeking to aid the problem of construction through resort to legislative history, we can offer no better supporting reason than that provided by Judge Learned Hand in *Cabell* v. *Markham* [20] where he observed:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. . ."

This is not a case where such a discovery of Congressional purpose can be made by mere reference to statements in conference reports or quotation of congressional comment isolated from the background of the controversy. On the contrary, the true intent of the language which resulted can only be understood against the backdrop of the intense struggle which characterized its passage—a struggle in which two forces of railway labor, with entirely different aims and objectives, finally each saw their objectives enacted into law. For this reason the history of this piece of legislation was exceedingly protracted in the light of the brief section which finally emerged.

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[20] 148 F. 2d 737, 739 (C. C. A. 2d), aff'd 326 U. S. 404, 409.

We intend to show several things by this review of the legislative history. We will show that what is now the first sentence of Section 5(2)(f) was originally intended as the sole provision to be inserted in the act for the protection of employees adversely affected by consolidation transactions; that this provision was regarded as completely satisfactory by the great majority of railway labor and by all of railroad management, and was envisioned as statutory insurance of at least a continuance of the principles of the Washington Job Protection Agreement of 1936—a private agreement existing between approximately 85% of the railroads of the country and 20 of the 22 railroad brotherhoods; that this provision, without more, was recommended by the so-called Committee of Six, was passed by the Senate, and was reported favorably to the House by the House Interstate Commerce Committee; and that when it was finally embodied into Section 5(2)(f) as the first provision thereof, it had a well settled meaning, purpose and scope and was clearly regarded by the Congress as a provision under which the Commission could continue to exercise its discretion to either grant protection along the lines of the Washington Agreement or improve upon that protection, after first satisfying the specific requirements of the second provision of the section.

We shall also show that the original proposal of what is now the second sentence of Section 5(2)(f), the so-called Harrington amendment, was designed, completely unlike the first provision of the section, to require that employees would neither be deprived of employment nor have their employment status impaired as a result of transactions approved under Section 5(2) of the act: that under successive modifications by the House of Representatives and Congressional conference committees, this original objective was limited in scope and time as it now appears in the second sentence of the statute; and that notwithstanding the modifications, its proponents regarded the provi-

sion as a measure of victory toward a totally different objective than that advanced by the proponents of the first provision of the section. We shall further show that at all times in the consideration of Section 5(2)(f) the provisions which follow the first sentence of that section were designed and regarded as minimum requirements, and that they were never intended to subtract from or restrict the operation of the first provision.

Finally, we shall show that the section as a whole was carefully explained by members of the Conference Committee which drafted the final measure as one which guaranteed certain minimum protection but which also intended that the Commission should be free to impose such further protection as in its discretion was considered necessary to provide "a fair and equitable arrangement."

A. *Background of the Legislation*

The situation which gave rise to the Transportation Act of 1940 was briefly this. The financial condition of the railroads had evoked considerable concern over a period beginning about 1929. Early in 1938, the President appointed three members of the Interstate Commerce Commission, referred to as the Committee of Three, to bring in recommendations "relating to this serious situation".[21] On September 20, 1938, the President appointed another special committee, this one known as the "Committee of Six", the membership of which was equally divided between management and labor,[22] and directed them "to con-

[21] H. R. Doc. No. 583, 75th Cong., 3d Sess., p. 1.

[22] The Committee of Six was composed of Mr. M. W. Clement, President, Pennsylvania Railroad; Mr. E. E. Norris, President, Southern Railway; Mr. C. R. Gray, Vice Chairman, Union Pacific Railroad; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, and Chairman of the Railway Labor Executives' Association; Mr. B. M. Jewell, President of the Railway Employes' Department of the American Federation of Labor; and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen. (Hearings on Transportation Act of 1939, Senate, pp. 4-5)

sider the transportation problem and recommend legislation."[23] Of significance to our problem here was their recommendation with respect to proposed changes in the consolidation sections of the Interstate Commerce Act that there be "a fair and equitable arrangement to protect the interest of the . . . employee".[24]

The equal division of membership of the Committee of Six between railroad management and railroad labor is significant for the purpose of our present inquiry. These men, all leaders in their field, were assembled to cooperate in an effort to benefit the industry upon which both wings of the Committee depended for their support. It is of importance to note that they were not there to adjust controversies between themselves. Their purpose was rather to formulate a plan for the rehabilitation of the railroad industry, a plan from which all elements involving controversies between labor and management would be eliminated in order that both parties might give it unreserved support.

Accordingly, no controverted question of labor relations was considered by the Committee. In its report to the President, the Committee stated:

> "Your committee has carefully considered many suggestions and recommendations which have come to us from various sources. We have also considered proposals advocated by railway management and the labor organizations having to do with labor relations, but laid them aside believing that they are in the main problems to be worked out to the extent possible in joint conference by these interests through collective bargaining, and if no solution can be found they may

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[23] Report of the Committee to the President, dated December 23, 1938, p. 1. The Report is reprinted on pp. 257-308 of *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862.*

[24] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862*, p. 275.

be urged upon the government or otherwise handled as the circumstances may appear to warrant." [25]

Also pertinent to the same effect is the testimony of Mr. George Harrison, at that time President of the Railway Labor Executives' Association, and one of the members of the Committee of Six, before the House Committee:

> "The railroads wanted to talk with us about amending the Railway Labor Act. We wanted to talk with them about a 6-hour day and we realized that if the members of the committee got to discussing, quarreling about those matters we would forget the job we were assigned to do and that job was to do something about the transportation industry." [26]

As far as the general question of consolidations was concerned, there was at that time no controversy either in or outside the Committee of Six. The Interstate Commerce Commission had flatly stated that elimination of the provisions of the Transportation Act of 1920 requiring the Commission to direct the consolidation of railroads into a prearranged limited number of systems was one of the primary purposes of the bill.[27] This plan had proved a failure and it was the consensus of opinion in the Committee of Six that it should be abandoned.

It was conceded, however, on all sides that economies could be brought about through consolidations of rail carriers voluntarily proposed. It was further conceded that *these economies would be realized principally at the expense of railroad labor.* At first glance, this would appear to present one of those controversial questions of labor relations which the Committee of Six desired to avoid. Such, however, was not the case because the potential conflict of interests between the parties had already been adjusted through the execution of the Washington Job Pro-

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[25] *Id.* at p. 277.

[26] *Id.* at p. 227.

[27] *Id.* at p. 31.

tection Agreement in May 1936.[28] This Agreement provided in essence for a system of allowances payable over a stated period to employees adversely affected by railroad consolidations, *with the protection dating from the time of the adverse effect.*

Accordingly, there was no controversy between the members of the Committee of Six as to the question of the protection of employees in consolidation cases, and the Committee could recommend, as it did, that in passing upon a carrier's application for leave to effect a consolidation, the tribunal having jurisdiction: "shall examine into probable results of the proposed consolidation and require as a prerequisite to its approval a fair and equitable arrangement to protect the interests of the . . . employee."[29]

It must be remembered that when the Committee made this recommendation, it merely advocated the doing of what the employee organizations and 85% of the railroads had already done through the Washington Agreement. That the above is an accurate appraisal of the reasons which actuated the Committee is revealed in the testimony of Mr. Harrison when he stated:

> "Now, the existing situation is this: In 1936 in the Spring of that year, we made an agreement with about 85 per cent of the mileage of the country providing a schedule of benefits for workers that might be affected by consolidations or mergers. That agreement has now been in operation for about three years and it has worked out very satisfactorily. It does

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[28] This Agreement was entered into by approximately 85% of the railroads of the United States and 20 railroad brotherhoods and covered provisions for the protection of employees adversely affected by unification, consolidation, merger and pooling transactions. Its provisions are summarized in the volume of House Hearings at page 241. The Agreement is printed in its entirety beginning at page 231 of these Hearings, cited *supra*, note 24.

[29] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862*, p. 275.

not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made." [30]

B. *Senate Proceedings*

Pursuant to the recommendations of the Committee of Six, Senators Wheeler and Truman, on March 30, 1939, introduced a bill, S. 2009, concerning which Senator Wheeler stated:

"We did take the recommendations of the Committee of Six, and we used them as a basis for much that is contained in the pending bill, . . ." [31]

Section 49 of the bill dealt with the subject of unifications, consolidations, etc., and provided that, among other things, [Sec. 49(3)(c)]:

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." [32]

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[30] *Id.* at pp. 216-217.

[31] 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6136.

[32] This language is almost identical with the recommendation of the Committee of Six, *supra*.

Hearings commenced before the Senate Committee on Interstate Commerce on April 3, 1939. On that day Mr. Harrison testified and stated that if it became necessary or desirable to have unifications or consolidations with resulting displacement of men a reasonable adjustment such as labor then had with management [33] would "in the main" protect labor. His testimony is of importance to the inquiry here because it demonstrates that the statutory proposal of the Committee of Six for the protection of labor, which is now the first sentence of Section 5(2)(f), was intended to preserve the Commission's discretion to apply the principles of the Washington Agreement.

Mr. Harrison said:

> "Now, we realize that to the extent there are unifications made and the extent that they can be shown to be in the public interest, railroad labor will be adversely affected so we say that the Interstate Commerce Commission shall have the authority and that is in the report to provide for reasonable provisions for the protection of labor. The Commission now has that authority, but it is disputed by the railroads. The Committee of Six agrees that labor shall be protected in those measures authorized by the Commission.
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> "In the report of the Committee of Six *we do not undertake to lay down the specific, detailed protection that should be accorded labor by the Commission, but we were very much of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the employees' labor unions.* It provides a schedule of benefits and protections.
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> "So to that extent I think the interest of labor will be protected, the public interest will be protected, and the oportunity to eliminate some bad situations

[33] The adjustment referred to was the Washington Job Protection Agreement.

in the railroad transportation machine will be available." [34] (Italics supplied.)

The hearings before the Senate Committee were concluded on April 14, 1939. On May 16, 1939, the Committee submitted its report to the Senate explaining therein the changes made and the unification and consolidation provisions of the bill. The report states that among the important changes accomplished by Section 49 of the bill was a provision:

> ". . . that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of Section 49, a fair and equitable arrangement to protect the interests of the employees affected.
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> "The provisions referred to immediately above were included pursuant to the recommendations of the report of the Committee of Six (p. 30). There are no similar provisions in existing law." [35]

The bill was debated on the floor of the Senate from May 22nd to May 25, 1939, when it passed by a vote of 70-6.[36] Section 49(3)(c) of the bill was left unaltered and represents what is today the first sentence of Section 5(2)(f) of the Interstate Commerce Act.

C. *House Proceedings*

In March 1939, Chairman Lea introduced a bill (H.R. 4862) which was similar to S. 2009 with respect to the consolidation provisions. Previously in January, Chairman Lea had introduced H.R. 2531 dealing in general with the same subject matter as H.R. 4862. With respect to consolidations, mergers, etc., H.R. 2531 authorized the Commission to approve the proposed consolidation transac-

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[34] *Hearings before the Committee of Interstate Commerce, U. S. Senate, 76th Cong., 1st Sess., on S. 1310, S. 2016, S. 1869, and S. 2009*, p. 34.

[35] Sen. Rep. No. 433, 76th Cong., 1st Sess., pp. 28-29.

[36] 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6158.

tion "subject to such terms and conditions and modifications as it shall find to be just and reasonable", and if it "will promote the public interest".[37]

The House hearings on the bills were conducted from January 24, 1939, to March 30, 1939. At these hearings, Mr. Gray, one of the management members of the Committee of Six, said there was no disagreement whatever about protecting employees displaced by consolidations and mergers, and that they had "a basis for compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination".[38]

Mr. Harrison told the House Committee that it was in the public interest to protect the rights and interests of the employees who may be adversely affected by consolidations.[39] He spoke of the provisions of the Washington Agreement, then in force three years, and which "has worked out very satisfactorily"[40] and added: "It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection."[41]

In short, the testimony of Mr. Gray and Mr. Harrison means that the carriers and labor had in good faith entered into the Washington Agreement, which extended protective conditions to displaced employees for a period of five years *from the date that the adverse effects oc-*

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[37] This language was substantially the language of Section 5(4) of the then existing act, and was utilized by the Commission prior to the Transportation Act of 1940 in affording protective conditions for employees adversely affected by consolidation transactions. *United States* v. *Lowden*, 308 U. S. 225.

[38] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862*, pp. 184, 193-194.

[39] *Id.* at p. 214.

[40] *Id.* at p. 260.

[41] *Ibid.*

curred. This agreement had been applied by the Commission in the *Lowden* case, and it was the sense of the Committee of Six that the proposed employee provision would insure adequate protection for labor by making mandatory a fair and equitable arrangement by the Commission but leaving as discretionary the exact nature of the protection to be afforded. By incorporating this language into the statute, Congress adopted the attitude of the Committee, i.e., that here was a non-controversial matter germane to the purposes of the statute which should be included without further debate.

On July 18, 1939, the House Committee reported its own bill by striking everything in S. 2009 after the enacting clause. Instead of codifying the act, as in the Senate bill, the House bill amended certain existing provisions of law and added a part III dealing with water carriers. With respect to the employee provision of the consolidation section, the House adopted the identical language of the Senate bill by requiring as a prerequisite to Commission approval of any proposed transaction under the consolidation section "a fair and equitable arrangement to protect the interests of the employees affected."[42]

The bill thus reported was debated in the House beginning July 21, 1939.

Harrington Amendment

On July 24, Mr. Harrington of Iowa suggested an amendment as follows:

> "Provided however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."[43]

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[42] Explained in H. R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

[43] 84 Cong. Rec., Part 9, 76th Cong., 1st Sess., pp. 9881-9882.

Mr. Harrington explained his amendment as protecting "the railroad worker against *any unemployment* or *any impairment of employment rights* as a result of consolidations."[44] (Italics supplied.)

Two things are immediately apparent upon consideration of this proposed amendment. First, it had an entirely different objective than the provision for employee protection passed by the Senate and recommended by the House Committee (now the first sentence of Section 5(2)(f)) since it sought to permanently prohibit the displacement of employees as a result of consolidations rather than to afford them dismissal and displacement allowances along the lines of the Washington Agreement, wherein adverse effect is a necessary prerequisite to the operation of the Agreement. Second, it very definitely sought to *add* to the proposal advocated by the Committee of Six as the measure of protection considered as reasonable by that Committee as well as by the Senate and House Committees. Had the amendment as originally proposed been adopted as a part of the finally enacted statute, consolidations might have been effected thereunder, but it would have been necessary to keep all employees of the consolidating carriers on the pay roll until such time as the normal attrition of the force reduced the number to the level needed for a permanent working force, and further would have required that there be no displacement from one position of employment to a position of less compensation.[45]

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[44] *Id.* at p. 9883.

[45] Such a proposal was not without precedent. In the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 49 U. S. C. § 250 et seq. (commonly referred to as the Coordinator's Act), which expired on June 17, 1936, Congress had included just such a provision as the original Harrington amendment sought to provide. By Section 7(b) it was provided that no employee was to be deprived of employment or be in a worse position with respect to his job by reason of any action taken pursuant to the authority conferred by this Act.

The Harrington amendment was adopted by the House and the bill passed on July 26, 1939. On July 29, the bill was sent to conference.

Regardless of the merits or demerits of the Harrington proposal, it is clear that it encountered widespread opposition. While the bill was in conference, the Legislative Committee of the Interstate Commerce Commission sent a special communication to Congress condemning the principle of the Harrington amendment in the following language:

> "As for the proviso, the object of unifications is to save expense, usually by the saving of labor. *Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement, of 1936* between the railroad managements and labor organizations. *The proviso, by prohibiting any displacement of employees,* goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable." [46] (Italics supplied.)

D. *1st Conference Report*

On April 26, 1940, the Conference Committee reported out S. 2009 with all changes made by the Senate and House in the consolidation provisions of Section 5 completely eliminated. With respect to the elimination of all mandatory employee protection from the bill, the Conference Committee made the observation that "the elimination of the consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might have otherwise resulted from these provisions." [47]

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[46] I. C. C. Report of January 29, 1940, p. 67.

[47] H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

The reason for this observation bears explanation. In the debate on the floor of the House it was established that the House conferees felt they were following the desires of the sponsors of the Harrington amendment in eliminating consolidation features of the bill, and that they believed such elimination would be a satisfactory substitute for the Harrington amendment as originally proposed.

Mr. Wolverton, one of the conferee managers on the part of the House, concisely relates the history of the legislation leading up to the elimination of the consolidation section as follows:[48]

> "I will first direct your attention to the consolidation provisions of the bill, which included the Harrington amendment. The Senate bill did not contain the latter amendment *nor any provision that approached it in similarity.* Thus it was directly in dispute between the two Houses. After long and careful consideration of the matter by the conferees, it was decided that the best possible manner to deal with the controversial amendment was to strike out all reference to consolidations, mergers, and so forth, in the bill, and thereby remove the cause of the fear of wholesale dismissals that the Harrington amendment sought to protect railroad employees against.
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> "Both the original House and the Senate bills, as reported by the respective committees, contained provisions which were thought to be sufficient to protect employees from dismissal. Each of the bills clearly and explicitly laid a duty upon the Interstate Commerce Commission to protect the employees by the following provision:
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> 'The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interest of the employees affected.'
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> "This provision was suggested by the committee of six appointed by the President, consisting of three representatives of railroad management and three

[48] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., pp. 5878-5881.

representatives of the railroad brotherhoods. The Committees adopted the language suggested by them. In doing so we thought we had provided reasonable safety and security for railroad employees against unwarranted dismissals resulting from railroad consolidation. In this view we had the unqualified support of 20 of the 21 railroad brotherhoods. They represented 92% of railroad labor. The Brotherhood of Railroad Trainmen, during the committee hearings, requested that all reference to consolidations be left out of the bill and that the law be permitted to remain as it was under the existing consolidation law and as it is now in the Interstate Commerce Act. This Brotherhood was evidently of the opinion that the rights of labor in case of consolidations, mergers, and so forth, was protected by the terms of the so-called Washington agreement that had been entered into by all of the 21 railroad brotherhoods with the management of most of the railroads of the country. This agreement was then and still is in force without any action by Congress. Believing that we were justified in accepting the viewpoint of 92% of railroad labor, we reported the bill to the House with the consolidation provisions and with the language *that would guarantee to railroad labor the continuance of the protection gained by the Washington agreement* and also the possibility of gaining *further rights* by collective bargaining *or by action of the Interstate Commerce Commission.*

"When the bill came to the floor of this House an amendment to the consolidation section was offered by the gentleman from Iowa [Mr. Harrington]. This amendment was offered at the suggestion of the Brotherhood of Railroad Trainmen, which had requested at the committee hearings the elimination of the entire consolidation section. At no time, either in the Senate or House hearings, had any such amendment as the Harrington amendment been offered or advocated by that or any other brotherhood. The most that the Brotherhood of Railroad Trainmen had ever suggested was that the old section be removed. And yet, now that the conferees have done what they had requested, they come before the House through their spokesman and object to what we have done.

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"For some unaccountable and unexplained reason, a few of the railroad brotherhoods, notwithstanding their previous declarations of satisfaction with the action of the conferees, with reference to the consolidation features of the bill, have now withdrawn their support from S. 2009 and seek to have the bill recommitted. I confess to you, after nearly 14 years of service in this House, this action by these national representatives of the brotherhoods to which I refer is the most unusual action of labor representatives that I have ever experienced. I have sought the reason. No one has yet explained.

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"More than 76% of railroad labor has repudiated the viewpoint of those who seek recommitment and are actively supporting the bill.

[Herein follows a statement against recommittal by 15 or the 22 railroad brotherhoods representing approximately 850,000 employees.]

"Before closing my remarks on the subject of railroad employment, I wish to bring to your attention and emphasize the fact that the conferees have done nothing in this bill that directly or indirectly will harm, disturb or deal unjuslty with railroad labor. . . .

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"There is no justification for any member of this House interested in railroad workers to vote against S. 2009." (Italics supplied.)

The House of Representatives, however, refused to accept S. 2009 as reported out of the Conference Committee. After vigorous debate, the bill was recommitted with instructions, among others, that the Harrington amendment be insisted upon by the House conferees. However, the original Harrington amendment was modified in the instruction to recommit to provide that the Interstate Commerce Commission include in any order authorizing the consummation of transactions under Section 5:

". . . terms and conditions providing that such transaction will not result in employees of said carrier

being in a worse position with respect to their employment." [49]

The original employee provision of S. 2009, as it passed the Senate and was reported out of the House Interstate Commerce Committee, was also amended in the motion to recommit to read as follows:

> "(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of contral, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." [50]

In other words, the modified Harrington amendment sought to add to the list of transactions subject to employee protection "the substitution and use of another means of transportation for rail transportation proposed to be abandoned". Moreover, the provision still contemplated the absolute maintenance of employment at the same level as before the transaction in question until normal attrition should reduce the force. This later provision was thus the same proposal to which the Senate Committee, the Conference Committee, and the Interstate Commerce Commission had already onjected.

In explaining the reasons for the modified Harrington amendment, Mr. Harrington on May 9, 1940, stated on the floor of the House:

> "Mr. Speaker, when I offered my amendment last July, I did so because there was no protection in the bill for the employees in the event of consolidation, *nor is there adequate protection for them in the pres-*

[49] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5886.

[50] *Ibid.*

ent law, and it is for this reason, and this reason only, that I believe you should vote to recommit the bill, with instructions to the managers on the part of the House that they insist that the modified language for labor protection be placed in the bill together with the change in the present law which will contain the consolidations sections requested by the railroads.

"There is not a railroad organization within the country which does not believe they should have *further protection* and those who have asked you to vote against recommitment are only doing so because they too have been mislead into believing that recommitment will kill the bill." [51] (Italics supplied.)

On May 9, 1940, the House by a vote of 209 to 182 adopted Mr. Wadsworth's motion to recommit directing its conferees to include, among other things, the revised Harrington amendment.[52]

E. *2nd Conference Report*

Again the matter was considered by the conferees, and on August 7, 1940, a second conference report was submitted to the respective houses.[53] The provisions for labor protection read as follows:

"Section 5(2)(f). As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee

[51] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5869.

[52] *Id.* at p. 5886.

[53] H. R. Rep. No. 2832, 76th Cong., 3d Sess.

pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

This is the present language of the Act.

The conference report explains the reasons for further modification of the Harrington amendment as follows:

"The House amendment included a proviso (the Harrington amendment) *prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provision in the Senate bill.*

* * * *

"The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. *This provision* has been retained in the substitute agreement agreed upon in conference.

"The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration.

"The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in a

worse position with respect to their employment. The conference agreement, however, qualifies *this provision* by confining *its* operation to a period of four years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.

"In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement, the benefits to employees will be required to be paid for not longer than four years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation."[34] (Italics supplied.)

It is clear from the explanation by the Conference Committee of the Section 5(2)(f) that in the minds of the conferees the first and second sentences were regarded as separate provisions with different objectives. The first sentence was designed to require a fair and equitable arrangement by the Commission for the protection of employees affected by transactions authorized under Section 5. It was mandatory only in that sense. It was discretionary in the sense that the nature and extent in time of the protection to be afforded was for the Commission to decide. No limitation in point of the type of protection or in point of time is suggested. This is clarified by reference to the previous statement of Representative Wolverton, one of the House conferees, when he explained the provision as designed to "guarantee to railroad labor the continuance

[34] H. R. Rep. No. 2932, 76th Cong., 3d Sess., pp. 68-69.

of the protection gained by the Washington agreement and also the possibility of gaining *further rights* by collective bargaining or *by action of the Interstate Commerce Commission.*" (Italics supplied.)[55] Thus, the possibility of further rights "by action of the Interstate Commerce Commission", even beyond the protective conditions of the Washington Agreement, was always contemplated by the first sentence of Section 5(2)(f), and its retention in the section as finally enacted can only be explained as intended to confer such authority on the Commission. Otherwise, the provision would be pure surplusage. In *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, this Court observed (p. 764):

> "In the present case, the legislative history confirms what a natural reading of the language of the agricultural exemption would indicate—the word production was not there used in the artificial and special sense in which it was defined in §3(j). Certainly, if it were meant in that sense, it would make surplusage of the remainder of the carefully wrought definition. . . ."

On the other hand, the second sentence deals with a specific type of protection expressly stated by the conference report to be a separate provision. Its imposition is required but the requirement is limited in point of time to four years from the effective date of the Commission's order. It is of the utmost significance to our problem here that in speaking of the four year period the conference report *expressly limits is applicability to the requirements of the second sentence only.*[56] To that extent it represents a minimum measure of protection below which the Commission cannot go in following the direction of

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[55] *Supra*, p. 42.

[56] The pertinent language referred to is "The conference agreement, however, qualifies *this provision* by confining *its* operation to a period of four years from the effective date of the order approving the transaction . . ." (Italics supplied). See full statement quoted *supra*, pp. 46-47.

the statute in the first sentence of Section 5(2)(f). But it most decidedly was never intended by Congress to "tie the Commission's hands" in providing additional protection or a more equitable arrangement under the first provision, and was never regarded as cutting down protection theretofore granted by the Commission, as in the *Lowden* case.

The debate on the floor of the House, particularly certain statements made by House members of the Conference Committee, provides additional support for these conclusions. In explaining the several provisions of Section 5(2)(f) to the House before the legislation was voted upon and adopted, Representative Lea, Chairman of the House Conferees, stated: [57]

> "The next amendment concerning which the House instructed us was known as the Harrington Amendment. There were certain things involved in the instructions as to this amendment to which I want to call your attention. The first was that the Interstate Commerce Commission should make fair and equitable provisions for employees affected adversely by reason of consolidations or unifications. We had a provision in the original bill that came to the House to that effect and the amendment that we have agreed upon embodies that same provision.
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> • • • •
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> "The substitute that we bring in here provides *two additional things.* First, there is a limitation on the operation *of the Harrington amendment* for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection *against unemployment* for 4 years, but the Commission is not *required* to give them benefits for any longer period. . . .
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> • • • •
>
> "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor

[57] 86 Cong. Rec., Part 9, 76th Cong., 3d Sess., p. 10178.

substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write *specific provisions that shall be in the order* of approval of the Commission, *but otherwise we do not tie its hands.*" (Italics supplied.)

It seems perfectly clear to us from the foregoing statement that Congress intended to preserve the Commission's discretion to provide further employee protection beyond the specific requirements of the second provision.

Identically the same views as to the intent and full force of the first provision of the section were expressed by Representative Wolverton, another of the members of the committee which drafted the language of the section:[58]

"Now, as to the Harrington amendment, the conferees have adopted practically the same language as originally adopted by the House, but with a modification as to the length of time the provisions are to be effective. *This amendment, as you are all possibly aware, was not in the Senate bill in any form whatsoever.* Objection was made that the amendment, in the language adopted by the House, would *guarantee* for life the employment of any and all employees of railroads participating in a consolidation or merger of their lines even though the employee's service may have been as little as a month, or even less; and, furthermore, if there was no work for them as a result of the consolidation or merger, yet their compensation would continue upon the same basis as at the time of consolidation and until death or their voluntary separation from the service of the company.

"In fact there were some who were of the opinion that it froze every job for the employee in service at the time of consolidation but also froze perpetually every job which existed at the time of the consolidation or merger. So, even death or resignation of the employee did not end the job. It would descend to someone else even though not in the employ of the railroad at the time of the consolidation or merger.

[58] *Id.* at p. 10189.

And, then there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.

"I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment. It was recognized that the real intent of the sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into. The Committee on Interstate and Foreign Commerce of this House in presenting its original bill used language which it thought accomplished that purpose. *We thought we were giving legislative assurance of at least a continuance of the Washington agreement* which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce Commission as a condition precedent for its approval in the Rock Island case, *United States* v. *Lowden* (308 U. S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. *We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future.* Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a mater for collective bargaining.

"The conferees have struggled long and hard to agree upon language that would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that it is acceptable to all who are to be affected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. *Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sudden dismissal and financial assistance* that is not enjoyed by workers in any other industry. And this is true without any exception or qualification whatsoever." (Italics supplied.)

The foregoing explanation seems to us to establish beyond question that the intention of Congress in writing the first sentence of Section 5(2)(f) was not only to permit the Commission to provide the principles of the Washington Agreement in consolidation proceedings, but also to use language which "would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future". Moreover, the "protection" intended is pointedly described as not only against sudden dismissal but also as providing "financial assistance". No statement by Congress could more expressly refute the Commission's construction of Section 5(2)(f) in this case.

The statements by Congressmen Lea and Wolverton represented the only extensive explanations of the meaning and intent of the provisions of Section 5(2)(f) offered to the House by members of the committee which drafted the language. These explanations were not challenged or

contradicted by any member of the committee.[59] They support the construction of the section here urged by appellant, and they not only fail to support but expressly refute the interpretation of the Interstate Commerce Commission.

Another attempt to recommit the bill for reasons among others that it did not afford the full measure of protection for employees desired by sponsors of the Harrington amendment was defeated in the House on August 12, 1940, by a vote of 212 to 112 and the bill passed the House on that date 247 to 75.[60]

On August 30, 1940, the bill was submitted to the Senate[61] and after debate which only briefly concerned the Harrington amendment, the bill was passed on September 9, 1940.[62] On September 18, the bill was signed by the President.

The legislative history is lengthy because of the struggle over the Harrington amendment in the House. It is important, however, because it shows what in our opinion is a conclusive demonstration that the provisions of Section 5(2)(f) were at all times a subject of controversy only as between two opposing labor groups, one insisting that the statute should require that no employee was to be deprived of employment as a result of transactions approved under Section 5(2), and the other satisfied that the measure of protection was to be left to the Commission's

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[59] On the contrary, to the extent that additional explanation was offered by other members of the Conference Committee, it is in entire accord with the views of Representatives Lea and Wolverton, although not as specifically pertinent to the precise issue here under consideration. See 86 Cong. Rec., Part 9, p. 10187 [Representative Halleck]; *Id.* at 10192 [Representative Crosser]. The same is true of the very limited explanation offered in the Senate by members of the Conference Committee: 86 Cong. Rec., Part 10, pp. 11269-11270 [Senator Wheeler]; *Id.* at p. 11545 [Senator Reed].

[60] 86 Cong. Rec., Part 9, 76th Cong., 3d Sess., pp. 10193-10194.

[61] 86 Cong. Rec., Part 10, 76th Cong., 3d Sess., p. 11269.

[62] *Id.* at p. 11766.

judgment of what was fair and equitable under the circumstances. A compromise resulted. That compromise was never in any sense a subtraction from the measure of protection granted by the first sentence in Section 5(2)(f).[68] The entire legislative history is devoid of a suggestion by anyone at any time that the measure of protection which the carriers and labor had voluntarily agreed to in the Washington Agreement and which they had sought to have insured by statutory language was to be limited or modified by the specific requirements of the Harrington amendment which, as modified, is now embodied in the second sentence of Section 5(2)(f). Never was a proposal made or suggested that the discretionary power vested in the Commission by the first sentence of Section 5(2)(f) was to be eliminated by the succeeding sentences. On the contrary, the few statements made by those who drafted the section which bear directly on the point in issue are precisely to the contrary of the Commission's asserted lack of authority in this case.

IV.

The District Court's Conclusion that the Commission's Construction of the Statute Is Entitled to Great Weight Is Without Merit.

In sustaining the Commission's construction of Section 5(2)(f), the District Court relied in part on certain Commission decisions which were cited by the Government in its briefs to that court (R. 72). These decisions were cited by the District Court in support of the proposition that the Commission's construction of the statute in the present case is in accord with its prior construction of the statute, and on that account entitled to great weight (R. 71-72). There are two reasons why the judgment below in this respect is erroneous.

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[68] Obviously if it ever was intended as such it would not have been, as Representative Wolverton stated it was, "acceptable to all who are to be affected by the provision." *Supra* page 52.

In the first place, only one of the decisions relied upon has any relevance to the issue in this case. That decision, *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction, etc.*, 257 I. C. C. 292, raised the identical issue here present and was decided by a majority of the Commission adversely to petitioner, Railway Labor Executives' Association, three Commissioners dissenting.[64] It was this decision, and this decision alone, which was relied upon by the Commission in reaching its conclusions in the present case (R. 30, 32). In the other cases cited by the District Court the issue of the proper construction of Section 5(2)(f) was not even raised for the reason that the protection there afforded under the minimum requirements of the second sentence of the section was considered adequate under the facts and circumstances present in those cases.

In the second place, it was established by this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 380, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.[65] Here, as there, the construction placed upon the provisions of the statute in question is not only opposed to the intention of Congress in enacting the measure, but is also incompatible with decisions of this Court considering that legislative history, as will be shown in the next section of this brief. Under such circumstances, administrative construction no matter how definitely settled by the Commission does not warrant affirmance.

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[64] 257 I. C. C. 292 at 294. No appeal was taken from the decision. Unlike the present case, the date for completion of the project ran out in 1944 which still left 2 years of protection under the Commission's order. See 257 I. C. C. 292 at 293.

[65] Unlike the present case where the interpretation of Section 5(2)(f) has been reached by the Commission in only one other case, the Commission's construction rejected in the cited case had been followed in a considerable number of cases.

Moreover, it is readily apparent from examination of decisions of this Court that the rule regarding the weight to be attached to administrative interpretation of statutes is not slavishly or uniformly followed in all cases. The rule arises out of certain practical considerations of which the courts have availed themselves when called upon to interpret statutes. These considerations have greater or less significance depending upon the circumstnces of the individual case. Properly interpreted, the rule does not bind the court no matter how well established the administrative construction. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 280. The rule applies with considerably less force if the administrative interpretation does not "embody the results of any specialized departmental knowledge or experience". *Haggar Co.* v. *Helvering*, 308 U. S. 289, 298. It "has peculiar weight when it involves a contemporaneous construction of a statute". *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315. It is entitled to greater or less respect depending upon whether the administrative interpretation has or has not been "continuous". *Wisconsin Central R. Co.* v. *United States*, 164 U. S. 190, 205.

Judged in the light of these guiding factors, the Commission's construction falls far short of satisfying the requirements for invocation of the rule.

The question here involved has no technical aspect which would give the Interstate Commerce Commission any inherent advantage growing out of its specialized knowledge in the field of transportation. On the contrary, the advantage is rather with the Court whose traditional function it is to interpret the meaning and purpose of statutes.

No settled interpretation of the question presented here has been established by the Commission. As stated above, this issue of construction has been presented for decision by the Commission in only one other case,[66] and in that

[66] *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction*, 257 I. C. C. 292.

case three Commissioners dissented. Further, the interpretation first made in that case was not contemporaneous with the enactment of the statute.

Finally since it is quite clear from the legislative history of the section that the Commission's interpretation is contrary to the intent of Congress, it cannot be binding on the Court.

V.

The Commission's Construction of Section 5(2)(f) Is Incompatible With This Court's Previous Interpretation of the Statute.

The precise issue in this case has never before been considered by the courts. There are, however, two decisions by this Court which, in considering the problem of employee protection under the Interstate Commerce Act, interpret the intent of Congress in enacting the provisions of Section 5(2)(f) consistently with our construction of the section and contrary to that urged by the Commission. These decisions are *United States* v. *Lowden*, 308 U. S. 225, and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. In deciding these cases, this Court examined the legislative history of Section 5(2)(f) and concluded that the purpose of that legislation was simply to make mandatory the protection for workers that had previously been discretionary.[67] The Court's conclusion in this respect is directly confirmed by Congressional comment on the intent and purpose of the first sentence of Section 5(2)(f) set forth above in the section on legislative history. There is no question that prior to the mandatory provisions of Section 5(2)(f) the Commission had discretion to provide the protection of the Washington Agreement if it so desired, wherein the period of protection commences with the consummation of the project and the time when the employee is adversely

[67] 308 U. S. 225 at 239; 315 U. S. 373 at 379.

affected rather than from the effective date of the Commission's order.[68] Consequently, the Commission's interpretation that the requirements of the second sentence of Section 5(2)(f) preclude its authority to exercise discretion theretofore available to it prior to the passage of Section 5(2)(f) squarely conflicts with this Court's view of Congressional intent.[69]

A further anomaly created by the Commission's negation of authority under Section 5(2)(f) is that it does possess under the *abandonment provisions* of the Interstate

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[68] Such protection was afforded by the Commission in the *Lowden* case to which repeated reference was made by Congress in its consideration of the provisions of Section 5(2)(f), *supra*. There the Commission, in authorizing a lease subject to certain conditions for the protection of employees, provided a period of protection, in the case of dismissed employees, from the date the employee was deprived of employment, and in the case of displaced employees from the time when operations under the lease began. This protection of employees was set aside by a federal district court (*Lowden* v. *United States*, 29 F. Supp. 9), but this decision was reversed by this Court. *United States* v. *Lowden*, 308 U. S. 225. At the time this case was decided (1938), the Interstate Commerce Act contained no mention of protection to employees adversely affected by coordination transactions, but the protection granted was upheld as a valid exercise of the Commission's authority under Section 5(4)(b) of the Transportation Act of 1920 to protect the public interest generally.

[69] This same view of the intent of the statute was taken by the lower court in *Railway Labor Executives' Association* v. *United States*, 38 F. Supp. 818, wherein Chief Judge Groner, then serving as the presiding judge of the three judge court which decided the case, said of the newly enacted Section 5(2)(f) (pp. 823, 824):

> "These discussions [the legislative history of Section 5(2)(f)] resulted only in the enactment of a provision requiring a 'fair and equitable arrangement' to protect employees in consolidation cases *and other more specific provisions* therefor.
>
> * * * *
>
> ". . . what was in 1920 left discretionary had become in 1940 an acknowledged right. To share with displaced personnel a part of the gain was then and now a necessary factor in the accomplishment of an efficient rail system." (Italics supplied.)

Commerce Act [70] authority to provide the very protection sought by appellant in this case and afforded by it in the *Lowden* case.[71] *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. Accordingly, under the Commission's view of the statute, which was undeniably available in terms of protection when the Interstate Commerce Act contained no requirements for protective conditions is now denied by a statutory provision which makes the imposition of an equitable arrangement for the protection of employees mandatory. Obviously, Congress intended no such incongruous result or inconsistency of statutory policy. The short answer is that not only the legislative history and the decisions of this Court but the common-sense meaning of the language of the statute itself are all arrayed against the Commission's interpretation.

CONCLUSION

For the reasons stated, the judgment of the District Court is erroneous and should be reversed with directions to set aside as contrary to law that part of the Commission's report and order of April 7, 1948, which holds that the Commission lacks statutory authority, in providing an equitable arrangement for the protection of employees, to extend the period of protection beyond four years from the effective date of said order; and further directing the Commission to take such action as will provide a fair and

[70] 49 U. S. C. § 1(18)-(20).

[71] The particular irony thus created as far as this case is concerned is that a considerable number of the employees affected by the New Orleans project will be dismissed from employment as a result of abandonments authorized by the Commission. But because of the fact that coordination transactions are also involved the Commission properly considered the abandonment and construction as component parts of an inseparable plan of operation (R. 32), and treated the entire problem of employee protection as subject to the mandatory provisions of Section 5(2)(f).

equitable arrangement for employee protection consistent with the basic statutory purpose and compatible with the requirements of this case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 337

RAILWAY LABOR EXECUTIVES ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

N APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

This proceeding was brought by appellant to set side part of an order of the Interstate Commerce Commission. As required by statute,[1] the United States was named as a defendant. The case is here on appeal from the judgment of the district court dismissing appellant's complaint, and the United States is a nominal appellee. Since the United States is of the view, however, that the order of

[1] See Section 2322 of Title 28, United States Code.

the Interstate Commerce Commission interpreting Section 5 (2) (f) of the Interstate Commerce Act is incorrect, this brief sets forth the grounds upon which it is submitted that the judgment of the district court is erroneous and should be reversed. See *Mitchell* v. *United States,* 313 U. S. 80, 92; *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 574, note 6.

STATUTE INVOLVED

Section 5 (2) (f) of the Interstate Commerce Act, as amended (54 Stat. 906, 49 U.S.C. 5 (2) (f)) provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such

employee was in the employ of such carrier or carriers prior to the effective date of such order.[2]

STATEMENT

In connection with construction of a new passenger terminal at New Orleans, the Interstate Commerce Commission authorized the consolidation and abandonment of certain railroad lines (R. 10), the order to "take effect" on May 17, 1948 (R. 43). Construction was to begin by December 31, 1949, and the project was to be completed by December 31, 1954 (R. 51). Approximately 1022 employees would be disadvantaged by the consolidation, of which some 350 would lose their jobs (R. 27). It was not possible to specify which employees would be those adversely affected, for most of the personnel changes would not occur until the project was completed in 1954 (R. 27, 28, 29, 30).

Pursuant to Section 5 (2) (f), the Commission included in its order provisions for the protection of employees adversely affected. In summary these consisted of compensation for any diminution of salary after displacement, including payment of full former salary if unemployed, reimbursement of moving costs, loss on sale of home or lease cancellation, and certain other benefits. The

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[2] The section contains a further sentence, not here material, safeguarding the right of railroads and their employees to enter into agreements related to protection of the interests of railroad employees.

Commission limited these benefits for employees to a period of four years from the "effective date of our order approving" the consolidation, for the reason that, under Section 5 (2) (f), "we have no authority to prescribe any other period" (R. 32).

Since this grant of benefits terminates on May 17, 1952, the practical effect of the order is that the great majority of the employees adversely affected by the consolidation get no benefits whatever.

QUESTION PRESENTED

The question thus raised is whether the second sentence of Section 5 (2) (f) imposes an absolute limitation upon the authority of the Commission to grant protective benefits to employees adversely affected by a consolidation of railroads to a period of four years from the effective date of the Commission's order, even though most of the employees will not begin to be adversely affected until the completion of the consolidation six years after the Commission's order. We do not believe that the statute need be given such an absurd interpretation.

ARGUMENT

Prior to the enactment of the present Section 5 (2) (f), *United States* v. *Lowden*, 308 U. S. 225, held that the Commission had discretionary authority to require benefits for employees disadvantaged by a consolidation for periods up to five years from the date of loss of employment, under a statute authorizing approval of consolidations on such condi-

tions as the Commission found to be "just and reasonable." In *Interstate Commerce Commission* v. *Railway Labor Executives Association,* 315 U. S. 373, this Court stated that the present Section 5 (2) (f) "merely make mandatory with respect to unifications the protection for workers that had previously been discretionary." (315 U. S. 379.) That case ruled that the Commission had such discretionary authority to grant employees benefits as a condition of abandonment of a railroad line under Sections 1 (18)-(20), providing for approval of abandonments under "such terms and conditions as in its judgment the public convenience and necessity may require."

The purpose of Section 5 (2) (f) was to make mandatory the previous discretionary duty of the Commission to protect employees in cases of railroad consolidation. The Commission's decision gives employees in cases in which the consolidation will take four years to complete less protection than they would have received under the general and non-mandatory language of the prior statute or under the present abandonment provision. Only very explicit language would justify a construction leading to such an anomalous result, and there is no such language here.

The crucial question in this case is whether the phrase "four years from the effective date of such [the Commission's] order" deprives the Commis-

sion of power to accord any protection to employees when the Commission approves a consolidation plan in which it will take over four years to construct the new facilities.[3]

Both the face of the statute and its history (discussed, *infra,* pp. 9-17, and in appellant's brief, pp. 28-54) make it clear that the object of Congress was to protect the railroad employees displaced by a consolidation. They also show that the sentence containing the four-years clause was added so as to provide additional protection, that the prior sentence giving to the Commission authority to fashion a discretionary remedy was not regarded as sufficient. In these circumstances, even if the language of the statute were plainer than it is when read as a whole, it would be appropriate for the Court so to construe the Act as to avoid an "absurd" result "plainly at variance with the policy of the legislation as a whole." *United States* v. *American Trucking Associations,* 310 U. S. 534, 543, and cases cited.

We believe, however, that there are two sound means of avoiding the unreasonable interpreta-

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[3] The opportunity to find another job during four years before completion of the new project could hardly be the type of protection Congress contemplated, for this would require the premature departure of employees who would still be needed to operate the old facilities. Moreover, since the employees would not know with certainty which 340 out of the 1022 would be displaced, many more than 340 might leave if the period of "protection" terminated before the displacement.

tion of the statute which the Commission felt was compelled by the literal language.

The first is to give the first sentence of Section 5 (2) (f), which gives the Commission general authority to "require a fair and equitable arrangement to protect the interest of the railroad employees affected," its full scope and literal meaning, and not to construe the second sentence containing the four-year clause as narrowing the authority of the Commission under the first sentence. This interpretation not only comports with the literal language of the Act, but is supported by the legislative history, which shows that the second sentence was designed to give employees more, not less, protection than the first.

The second approach is to construe the phrase "four years from the effective date of such order" as meaning four years from the date on which the order affects an individual employee. This interpretation, although a slight departure from the literal meaning of the words of the statute, is narrower than that suggested above, since it would limit the Commission's authority to the period specified in the second sentence—a lesser period than that which this Court sustained in the *Lowden* case. We will discuss the second of the suggested interpretations first.

1. When Congress used the phrase "four years from the effective date of such order" it unquestionably did not have in mind the present type of

situation, in which the construction of a consolidated facility would take so long that the employees would not be displaced until after four years from the effective date of the Commission's order. That Congress assumed that "four years from the effective date of the order" and "four years after the consolidation" were synonymous, appears from the use of the expressions in two consecutive paragraphs of the conference report, quoted *infra*, pp. 13-14. Clearly Congress meant that each displaced employee should receive the benefit of the four-year period of protection—without regard for the length of time necessary to construct the consolidated facility which would bring about the displacement. The failure of Congress to anticipate the present contingency, and thus to use language which adequately dealt with it, does not prevent the Court from giving the words of the four-year clause the meaning which Congress obviously intended them to have. Since Congress thought that the clause was giving each displaced employee four years' protection, the second sentence can reasonably be construed as meaning that the employee shall not be "in a worse position" during the period of four years from the date on which the order affects him.

2. The Commission has authority to grant the employees effective relief under the first sentence of Section 5 (2) (f). There is no reason to construe the second sentence as superseding and largely

nullifying the literal meaning of the first.[3a] The first sentence of Section 5 (2) (f) provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected.

This provision makes mandatory "fair and equitable" measures to protect the employees and grants the Commission discretion as to the nature and extent of the relief. The second sentence was not meant to narrow the scope of the first. This is shown not only by the history of the section, discussed below, but by the reference in the "except" clause of the second sentence to "the protection afforded to any employee pursuant to this *sentence*", not this subsection or paragraph.

This interpretation of Section 5(2)(f) is supported by its history. In 1936 the "Washington Agreement" was entered into between 85% of the railroads in the United States and labor organizations representing approximately 92% of railway

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[3a] It is unnecessary to decide in this case whether the intention manifested in the second sentence would prevent the Commission from giving any employee protection for more than four years from the time he was adversely affected. The Commission might properly take this factor into account if the Court holds that it does not lack power to protect beyond four years from the effective date of its order.

labor.[4] This agreement provided protection for employees affected by consolidation or merger of railroads. Under the agreement, employees who continued in the employment of the railroads were guaranteed that they would be in no worse position with respect to compensation and working conditions for a period not exceeding five years; employees whose employment was terminated were entitled to receive 60% of previous compensation for varying periods of from six months to five years, based upon the length of previous employment, and amounting roughly to something less than half the period of previous employment. Employees also received moving costs, loss on sale of home and lease cancellation, and certain other benefits. Significantly, these benefits ran from the date the employee was adversely affected.

By 1938 the Commission had ruled that, under the existing statute, it had discretionary authority to require benefits, substantially similar to those set forth in the "Washington Agreement", to be granted to employees affected by consolidation, *Chicago, Rock Island & Gulf Railway Co. Trustees Lease,* 230 I. C. C. 181, 187, 188, approved by the full Commission, 233 I. C. C. 21, affirmed by this Court in 1939, *United States* v. *Lowden, supra.*

When, in 1938, the President appointed a Committee of Six, composed of railroad management

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[4] Hearings before the Committee on Interstate and Foreign Commerce on H. R. 2531, House of Representatives, 76th Cong., 1st Sess., pp. 231, 241.

and labor, to make recommendations with respect to improving transportation, the precedent was well established of protecting railway personnel who were displaced by consolidations. Included in the report of this Committee was the recommendation that, in connection with consolidations and mergers, there should be a requirement of a "fair and equitable arrangement to protect the interests of the * * * employees."[5] This was, in substance, the source of the first sentence of Section 5(2)(f).

In 1939 bills were introduced in both Houses containing this requirement.[6] There was testimony at the hearing that it was understood that the effect of the provision would be to empower the Interstate Commerce Commission to continue the current practice of requiring employee protection at least to the extent of the "Washington Agreement."[7] The bill was passed by the Senate,[8] and the bill reported by the House Committee on Interstate and Foreign Commerce contained the same provision.[9] But on the floor of the House, Congressman Harrington offered an amendment to that section providing that no consolidation

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[5] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531, p. 275.

[6] S. 2009, H. R. 4862, 76th Cong., 1st Sess.

[7] Hearings before the Committee on Interstate Commerce, Senate, 76th Cong., 1st Sess. on S. 1310, S. 2016, S. 1869, and S. 2009, p. 34; House Hearings, *supra*, pp. 193, 194, 243, 244.

[8] 84 Cong. Rec. 6158.

[9] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

shall be approved by the Commission if it "will result in unemployment or displacement of employees * * * or in the impairment of existing employment rights of said employees."[10] The effect of the Harrington amendment would have been to freeze employees in their jobs indefinitely as a result of railroad consolidations. The amendment was intended to give the employees more protection than was afforded by the "fair and equitable" clause previously introduced. It was supported by the Brotherhood of Railway Trainmen[11] and opposed by the majority of railway labor.[12]

The Harrington amendment was passed and the bill sent to a conference committee. That committee resolved the conflicting views by leaving out the consolidation section of the statute entirely which, in effect, would have preserved the status quo.[13] Nonetheless, when the bill was returned to the house, Congressman Harrington and others urged that the bill be recommitted with instructions to include the substance of his previous amendment. He argued that railway labor "should have further protection".[14] Congressman Sparkman favored recommitment on the ground that "as between the measure passed by the Senate and the Harrington amendment in the

[10] 84 Cong. Rec. 9881, 9882.
[11] 84 Cong. Rec. 9883, 9884, 9886.
[12] 84 Cong. Rec. 9889, 86 Cong. Rec. 5880.
[13] H. Rep. No. 2016, 76th Cong., 3d Sess.
[14] 86 Cong. Rec. 5869.

House, some workable plan could have been provided."[15] The bill was sent back to conference with instructions to insist upon a revised subsection (f).[16] The first sentence of the proposed House draft was, so far as material, the same as the first sentence of Section 5(2)(f) as enacted. The second sentence provided that the Commission's order should include conditions that the consolidation will not result in employees "being in a worse position with respect to their employment."

The conference committee, this time, reported the bill in the form in which it was passed. The conferees had retained the second sentence as instructed, but added to it the four year time limitations.

In explaining the bill, the Conference Report states (H. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68-69):

> The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute agreement agreed upon in conference.
>
> * * * * *

[15] 86 Cong. Rec. 5883.
[16] 86 Cong. Rec. 5886.

The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in a worse position with respect to their employment. The conference agreement, however, qualifies this provision by confining its operation to a period of *four years from the effective date of the order* approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.

In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for *not longer than four years after the consolidation,* and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation. [Italics supplied.]

The report thus indicates that the time limitation was upon the duration of the mandatory requirements of the second sentence of 5 (2) (f)—a qualification upon the provision that the employees shall not be placed in a worse position with respect to their employment. In particular, after quoting the statutory language, the report paraphrases it to state that benefits will be required to be paid for not more than "four years after the consolidation"—an interpretation that places no absolute limit on the Commission and provides benefits from a date when the consolidation has in fact been accomplished.

The bill as reported was explained on the floor of the House. Although the general purpose was clear, there was no reference to the present problem. Various expressions bearing upon the point indirectly are susceptible of construction as supporting both appellant's and the Commission's interpretation of the statute. On the whole, however, it appears that those Congressmen most responsible for the bill did not regard the second sentence as limiting the first. In reporting the bill to the House, Congressman Lea, Chairman of the Conference Committee, stated (86 Cong. Rec. 10178):

> The next amendment concerning which the House instructed us was known as the Harrington amendment. There were certain things involved in the instructions as to this amendment to which I want to call your attention.

> The first was that the Interstate Commerce Commission should make fair and equitable provisions for employees affected adversely by reason of consolidations or unifications. We had a provision in the original bill that came to the House to that effect and the amendment that we have agreed upon embodies that same provision.
>
> * * * * *
>
> There was a further provision—the instruction as to the Harrington amendment—that the agreement should include conditions so that the transaction will not result in employees being placed in a worse condition with respect to their employment. That provision is written in the conference agreement.

This statement recognizes the independent origin of the two sentences. In discussing the four-year period added by the Committee, Congressman Lea talks in terms of a limitation upon the requirement of the second sentence, not in terms of a limitation upon the power of the Commission.

> The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for four years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for four years, but the Commission is not required to give them benefits for any longer periods. * * * [86 Cong. Rec. 10178].

And there is clear indication that it was not intended to place railway labor in a worse position than it had been prior to the enactment of this statute.

> We take nothing from labor by this agreement. We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands. [*Ibid.*]

On the other hand, under questioning, Mr. Lea describes the effect of the four-year period in less elastic terms.

> Mr. VORYS of Ohio. Would this four-year rule have the effect of delaying a consolidation for four years, or would it mean that if a consolidation were made there would still be a four-year period during which the man would be paid?
>
> Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for four years. The order determines the date, and the protective benefits run four years from that date.
>
> Mr. VORYS of Ohio. That would be whether or not they were still employed?
>
> Mr. LEA. Yes. [*Ibid.*]

But throughout the debate, there is no real dispute that the basic purpose of the statute was to afford realistic and practical protection to railroad

employees who would suffer as a result of this type of transaction.

> Mr. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his employment. Does "worse position" as used mean that his compensation will be just the same for a period of four years, assuming that he were employed for four years, as it would if no consolidation were effected?
>
> Mr. LEA. I take that to be the correct interpretation of those words. Our conference agreement followed the instructions of the House in that respect. It gives railway labor generous protection against sudden and long unemployment. [*Ibid.*]

While there may be some room for conflicting interpretations of the debate, it is our view that any ambiguity results largely from inexactness of phrasing in oral discussion by speakers who did not have the present problem in mind, and does not reflect a real dispute as to the basic purposes intended to be furthered by the legislation. The key factor underlying enactment of the section was that the first sentence originated in the recommendations of the Committee of Six, and the second sentence stemmed from the Harrington amendment. Both provisions were intended to benefit railway labor; both provisions were supported by different factions of railway labor; and it was never suggested

that either was intended to place any employees in a worse position than they would have been had no amendment at all been passed.[17] While the practice of the Commission, as exemplified by *Chicago, Rock Island & Gulf Railway Co. Trustees Lease*, 230 I. C. C. 181, approved, 233 I. C. C. 21, did not insure benefits to employees in every instance as large as those under the present Section 5 (2) (f), it granted benefits which accrued when the employee was adversely affected. The instant decision of the Commission grants no benefits whatever to bridge the gap which follows unemployment or adversity.

We submit that the "scope and function" of Section 5 (2) (f) would be effectuated more consistently, in the light of "the history of events" which it summarizes (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 185-186, 190-191), if the first sentence is treated as independent of the second, and if the phrase "effective date of such order" is interpreted as the date upon which the employee is adversely affected by the approved consolidation. This would establish a date from which benefits would run in conformity with the former statute and practice of the Commission, and would have the practical result clearly intended by Congress for a group otherwise deprived completely of the protection afforded to employees suffering as a result of the consolidation or abandonment of railroad lines.

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[17] Cf. remarks of Congressman Wolverton, a member of the Conference Committee, 86 Cong. Rec. 10189.

For these reasons, the judgment below should be reversed.

Respectfully submitted.

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869018—50——1

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 337

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the specially constituted district court (R. 69) is reported in 84 F. Supp. 178. The report of the Interstate Commerce Commission (R. 10) is published in 267 I. C. C. 763.

QUESTION PRESENTED

The single question presented is whether the three-judge district court correctly ruled that

the Commission was right in holding, as matter of law, that the fair and equitable arrangement contemplated by Section 5 (2) (f) of the Interstate Commerce Act is measured by the specifications therein of a protective period of four years from the effective date of its order approving a transaction within the scope of Section 5 (2) of the Act.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in Appendix A to this brief.

STATEMENT

In the *New Orleans Union Passenger Terminal case*, 267 I. C. C. 763, the Commission approved and granted, April 7, 1948 (by order to become effective 40 days thereafter) the joint application of railroads serving New Orleans (including the belt line railroad owned and operated by the city) for authority to construct and acquire certain lines of railroad, to jointly own or use lines of railroad, and to abandon certain other lines or operations on such lines—all as necessary incidents to the construction of a new railroad passenger terminal at New Orleans and the removal within that city of certain trackage for the purposes of eliminating grade crossings. As conditions upon which its approval of the carrier transactions was given, the Commission, in compliance with Section 5 (2) (f) of the Interstate

Commerce Act, prescribed arrangements for the protection of employees affected (see Exhibit B to complaint, R. 43–48) in language as follows (Exhibit A, R. 32–33):

> We are of opinion that a fair and equitable arrangement for protecting the interests of employees adversely affected by the applicants' proposals here will be provided by conditions similar to conditions (4) to (9), inclusive, imposed by us in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177 (197–201), which are similar to those prescribed in *Chicago, B. & Q. R. Co. abandonment, supra,* and our approval and authorization herein will be granted subject to those conditions.

"The total number of employees on the New Orleans lines that probably would be affected by the contemplated changes in operations," the Commission said (R. 27), "has been estimated by a committee of transportation officers, on the basis of present-day conditions, at 1,022, and the number required to operate and maintain the union passenger terminal has been estimated at 680. As provided in the terminal agreement, so far as feasible the terminal manager will recruit the necessary personnel from supervisory and other employees displaced at the 5 separate stations to be abandoned on completion of the union passenger terminal. The estimates indicate a net displacement of about 350 employees, of whom 9

are bridge tenders and about 108 are crossing watchmen now employed on tracks which will be retired or over which train and yard movements will be reduced; but the opinion is expressed that the number eventually displaced will not exceed 300."

In granting applications under section 1 (18)–(20) of the Act for permission to abandon railroad lines, the Commission has discretionary authority whether or not to impose conditions for the protection of labor. *Int. Com. Comm.* v. *Railway Labor Executives' Assn.*, 315 U. S. 373. But when granting applications for consolidation, merger, or other coordination of railroad properties or operation under section 5 (2) of the Act, the Commission is not left with discretion but is required to impose such conditions for a protective period of four years from the effective date of the Commission's order approving the carriers' applications. Section 5 (2) (f). Although the New Orleans project involved abandonments, its consummation required the coordination of railroad facilities and operation. The railroads contended, however, that whether employee protection should be afforded under section 5 (2) (f) or under section 1 (20) it was not appropriate to include grade-crossing watchmen and bridge tenders, because such employees will lose their employment, not because of coordination of railroad facilities and operation, but because of elimination of grade crossings, or as a result of

filling in New Basin Canal, in the exercise of the city's police power; and in this connection they asked the Commission to find that the loss of employment by those employees would not be the result of coordination of rail facilities and operations, but of the highway traffic improvement program engrafted on the union terminal project (R. 31–32). In answer appellant Railway Labor Executives' Association, intervener in the proceeding, pointed out that the project was presented as an inseparable unit; that the general plan for rerouting railroad traffic involved elimination of the grade crossings and consequent elimination of the crossing watchmen's jobs; and that, since the plan was to be consummated by coordination of railroad facilities and operation, employee protection under section 5 (2) (f) was mandatory (R. 32). Referring to the railroads' said contention and the intervener's answer, the Commission said (R. 32):

> * * * We imposed conditions under section 5 (2) (f) for the protection of employees adversely affected by a proposed abandonment, because abandonment and construction were component parts of an inseparable plan of operation, in *Texas & P. Ry. Co. Operation,* 247 I. C. C. 285.
>
> Our authority to impose conditions for the protection of employees in abandonment proceedings is discretionary, but imposition of such conditions in proceedings under section 5 (2) is mandatory. In this

> proceeding the proposals to abandon and the proposals within the scope of section 5 (2) are inseparable parts of a general plan for coordination of operation. Accordingly, we think that the conditions to be imposed by us herein should conform to the requirements of section 5 (2) (f).

Although section 5 (2) (f) provides for a definite period of employee protection, namely, four years from the effective date of the Commission's order approving the carrier transactions, the intervener contended that this provision simply fixed the minimum period of protection, leaving the Commission with discretion to extend the period where in its judgment it was equitable to do so. In this connection it urged that, since it was estimated that physical consummation of the project would require four or five years, the protection afforded by the Commission should continue for a period of at least four years from the time employees were adversely affected, and that such protection should extend to all employees so affected (R. 28). Section 5 (2) (f) of the Act provides as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall in-

clude terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Referring to the intervener's contentions that the four-year period specified in the above simply fixed the minimum period of employee protection, leaving the Commission with discretion to extend such period, and that, in the present case, the protection afforded should continue for at least four years from the time employees were adversely affected, the Commission said in its report (Ex. A to Complaint, pp. 12–13):

> The intervener urges that the intention of section 5 (2) (f) is to provide a period of readjustment for employees adversely

affected, and that no such period is afforded by merely serving notice now that a specified number of employees, without any identification, will be no longer needed 4 or 5 years hence. It therefore maintains that the purpose of the statute can be served only by dating any protective measures from the time when adverse effects of the project on employees become manifest, and that its proposal that employees receive protection for 4 years after completion of the project and after the date of adverse effect on them is not contrary to the provisions of section 5 (2) (f), which, the intervener submits, establishes the minimum, and not the maximum, period of protection.

In this connection the intervener refers to our determination in *Chicago, M., St. P. & P. R. Co., Trustees Construction*, 257 I. C. C. 292, wherein the Commission denied a petition for extension of the date of commencement of the protective period for adversely affected employees, saying:

"Section 5 (2) (f) prescribed a definite period of protection, namely, 'four years from the effective date of such order.' In our opinion, we have no authority to prescribe any other period in a case arising under section 5 (2)."

The intervener contends that conclusion should be reconsidered, pointing out that in *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 230 I. C. C. 181, and 233 I. C. C. 21, decided prior to the enactment of section 5 (2) (f),

we approved and authorized a lease subject to certain conditions for the protection of employees, with a period of protection to run from the time when operation under the lease was to begin. It argues that, while section 5 (2) (f) makes employee protection mandatory, rather than discretionary, as before, there was no intention thereby to decrease the measure of protection theretofore available.

Finally, the intervener undertakes to distinguish, in scope, the general directive in the first sentence of section 5 (2) (f) from the specification, in the following sentence, of the terms and conditions which we are to include in our orders under section 5 (2), contending that the general directive and the specification of terms and conditions are of equal weight, and that if the specification is considered as fixing the minimum period of protection, the general provision is nullified. It urges that an arrangement cannot be considered fair and equitable protection to employees when its effect would be to deprive them of all protection.

Following the above, the Commission first referred to the railroad's anticipation, or assumption, that, in prescribing labor protective conditions, it would follow the practice it followed in cases in which it was unable at the time of decision to determine whether any employees would be affected, that is, that it would prescribe such

conditions in the language of the statute (see *Chicago & N. W. Ry. Merger,* 261 I. C. C. 672), that they urged, however, that it follow the pattern set in the *Burlington case,* 257 I. C. C. 700, by setting out detailed rather than general conditions (R. 31). Next the Commission discussed the railroad's contention, already described, that it should not include grade crossing watchmen or bridge tenders because the loss of employment by those men would result, not from coordination of railroad facilities, but from the City's highway program, calling for the elimination of grade crossings, by abandonments of lines and rerouting traffic. In answer, as above shown, the Commission (agreeing with intervener in this, R. 32) ruled against the contention, holding that such employees should be included in the employee protective arrangements prescribed as conditions in its order of authorization. Right following the Commission said (R. 32):

> As the record shows definitely that employees will be affected adversely by the applicants' proposals, it is appropriate in this case that we require a fair and equitable arrangement to protect the interests of employees so affected. We think that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorizations herein granted. But we also think that the fair and equitable arrangement contemplated by section 5 (2) (f) is meas-

ured by the specification therein of a protective period of 4 years from the effective date of our order approving a transaction within the scope of section 5 (2). As was decided in *Chicago, M., St. P. & P. R. Co. Trustees Construction, supra,* we have no authority to prescribe any other period.

As already mentioned (p. 2 supra), the order as entered by the Commission prescribed detailed conditions (similar to conditions (4) to (9) in the *Oklahoma Ry. case,* 257 I. C. C. 177), this being its practice where it definitely appeared at time of decision that employees would be adversely affected.

SUMMARY OF ARGUMENT

1. Contrary to appellant's contention, the statutory provision limiting the period of employee protection to 4 years from the effective date of the Commission's approval order does not simply fix 4 years as the minimum period, leaving the Commission free to extend and change the same to 4-year protective periods to commence when each employee is adversely affected by the transaction approved. The statute, after providing that as a condition of its approval under section 5 (2) of any transaction involving carriers by railroad, the Commission shall require a fair and equitable arrangement to protect the interests of employees affected, plainly sets, as the standard of fair and equitable employee protection, that,

for a period of 4 years from the effective date of the approval order, the transaction shall not result in the employees of the carriers affected by the order "being in a worse position with respect to their employment," the only qualification of this being the exception to the effect that, where an employee's employment prior to the effective date of the order has been for less than 4 years, then, the Commission, in the case of such employee, is not to require the protective period subsequent to such date to continue for a period any longer than that of the employee's prior employment. Since the exception limits even the length of the 4-year protective period, it necessarily follows that the period of 4 years from the effective date of the approval order is as long as the statute contemplates the Commission may provide for. Moreover, as further demonstrating that Congress did not intend that the Commission could liberalize the statute at will, it should not be put out of mind that the last clause of section 5 (2) (f) points the way Congress intended should be followed in situations where the statute's pattern of employee protection or the period is deemed unsatisfactory, in that there, by express provision, employees or carriers are left free to negotiate different arrangements. It cannot be attributed to Congress that it was without knowledge that there would be few transactions where the adverse effects to employees would follow at once

upon the effective date of the approval order or that there would be many where such adverse effects would be long deferred. An important purpose of section 5 (2) (f) is, as will be shown, to safeguard employees against sudden loss of employment, and, even though here the large majority of employees will not be adversely affected (bringing into play the protective arrangements) until after the 4-year period, nevertheless, for said period of 4 years they will have been and will be protected in their employment.

2. Contrary to appellant's contention, the employee protective *conditions* which the second sentence of section 5 (2) (f) directs the Commission to include in its order of approval are not distinct in type and extent from the fair and equitable employee protective arrangements which the first sentence provides that the Commission shall require as a *condition* of its approval of any transaction involving carriers by railroad. Appellant correctly states (Br. 12) that the specific type of protection required by the second sentence is "that an employee shall not be in a 'worse position' with respect to his employment," but this, of course, simply sets an administrative standard for the Commission's guidance, since the statute does not, itself, spell out the detail necessary to give effect thereto; and, accordingly, appellant's contention that the type of protection required by the second sen-

tence is distinct from that required by the first means that it is in effect arging that Congress has supplied two distinct and different administrative standards (in the matter of the type of employee protection) to guide the Commission in formulating an employee protective arrangement to be imposed as a condition to its approval or authorization of any transaction involving a carrier or carriers by railroad. Appellant contends (Br. 13) that said requirement, or standard, of the second sentence that employees are not to be placed in a worse position with respect to their employment and the other requirement of the sentence limiting the protective period to 4 years "constitute minimum requirements below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence but beyond which it is free to act if the circumstances of a particular case require a more extended period." True, the standard that employees will not be placed in a worse position with respect to their employment, although one requiring full employee protection, still is a minimum requirement below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence. But the emphasis placed by appellant on its being a minimum requirement implies that appellant considers that the Commission acting under authority of the first sentence (isolated

from the second) is empowered to formulate and prescribe a fair and equitable protective arrangement which would do more for the employees (Br. 27), placing them in a better position (than the present) with respect to their employment, and this, too, without limit in point of time imposed on the Commission (Br. 13). Doubtless this is not intended, but it serves to emphasize, if emphasis is necessary, that Congress has not supplied two distinct standards for administrative guidance, but that the fair and equitable employee protective arrangement required by the first sentence is the full employee protection set as a standard by the second, and that being so, that the Commission is not empowered to extend the protective period at will but is limited by the same standard to the 4-year period.

3. The legislative history definitely confirms what is plain on the face of the statute. As stated by appellant (Br. 34), section 49 of bill S. 2009 (March 30, 1939) dealt with the subject of unifications, consolidations, etc., and as passed by the Senate, contained a provision substantially the same as the first sentence of section 5 (2) (f) of the Act. The House bill, as reported by the House Committee, contained an identical provision, but, as passed by the House, the Harrington amendment was substituted, which as a practical matter would have precluded authorization of transactions under section 5 (2) that would

adversely affect employees. The Conference Committee met the situation by eliminating from the bill everything that bore on unifications, consolidations, etc., which action would have left the law as it was, that is, would have left the Commission's authority to impose employee protective conditions the same as it was when exercised by its report and order, sustained in *United States* v. *Lowden*, 308 U. S. 225. The Conference Committee's action, however, proved unsatisfactory and the bill was recommitted by the House to the conferees with instructions, among others, to insist upon a modified Harringfon amendment. The motion to recommit, passed by the House, contained a modified Harrington amendment, which, save for two exceptions, was practically the same as section 5 (2) (f) of the Act. One of the exceptions was that the Commission would have been required to prescribe the employee protective arrangements, not only as a prerequisite to its approval of consolidations, mergers, etc., but also as a prerequisite to its approval "of the substitution of another means of transportation for rail transportation proposed to be abandoned." (This exception was eliminated by the Conference Committee because deemed to be impracticable of proper administration.) The other exception was that the proposed modified Harrington amendment, in marked contrast to section 5 (2) (f) as enacted, contained no provision

limiting the time of the employee protection afforded. With the two exceptions described, however, the modified Harrington amendment was, as stated, practically the same as section 5 (2) (f), and the thing of importance to be noted is that, just as is done in section 5 (2) (f), said modified Harrington amendment consolidated the provision requiring that, as a prerequisite, or condition, to its approval of a carrier transaction, the Commission impose fair and equitable employee protective arrangements, with the succeeding provision directing the Commission to include in its order of approval terms and conditions "that such transaction will not result in employees * * * being in a worse position with respect to their employment."

As above stated, such standard ensuring employees against being in a worse position with respect to their employment is one of full employee protection, and it appears that that fact, particularly coupled with the fact that, as proposed, such full protection was unlimited in point of time, brought about strong opposition. For example, Chairman Lea of the House Conferees, speaking of the proposed modified Harrington amendment, said that the proposal to indefinitely place unemployed labor in a position no worse than when it ceased was fantastic. As a result of such opposition, changes were made embodying the provisions now in the statute,

limiting the protective period to 4 years from the effective date of the approval order subject to the further limitation as to employees whose employment prior to that date has been for a lesser period. And as so changed, together with certain further minor changes, the modified Harrington amendment was enacted into law as section 5 (2) (f) of the Act.

4. Further confirmation of the correctness of the District Court's decision is supplied by decision of the Commission rendered contemporaneously with the enactment of section 5 (2) (f), or shortly after, and since consistently adhered to.

ARGUMENT

1. Appellant's contention that the statute, instead of limiting the period of employee protection to 4 years from the effective date of the Commission's approval order, simply fixes the said 4 years as the minimum period of employee protection, leaving the Commission with discretion to extend the period in instances where it believes it would be equitable to do so, is erroneous

Although containing additional supporting argument, the brief filed by appellant adheres generally to its contentions as intervener before the Commission. As above shown, its first said contention is stated in the Commission's report as follows:

> The intervener urges that the intention of section 5 (2) (f) is to provide a period of readjustment for employees adversely

affected, and that no such period is afforded by merely serving notice now that a specified number of employees, without any identification, will be no longer needed 4 or 5 years hence. It therefore maintains that the purpose of the statute can be served only by dating any protective measures from the time when adverse effects of the project on employees become manifest, and that its proposal that employees receive protection for 4 years after completion of the project and after the date of adverse effect on them is not contrary to the provisions of section 5 (2) (f), which, the intervener submits, establishes the minimum and not the maximum, period of protection.

It would seem that, to attribute to the statute the purpose that its protective period, specified as four years from the effective date of the approval order, should be read instead as providing for, or permitting of, a protective period running for four years after the completion of the project and after the date of adverse effect on an employee, required considerable disregard of language and also distortion of any indicated purpose. True, here appellant, instead of continuing to treat the 4-year period as some limitation, asserts that it simply fixes a minimum of 4 years leaving the Commission free in cases where it deems equitable to further extend the time, but the effect of that is to urge that the Commission

is not restricted at all by the limiting provisions of the statute. Furthermore, while it may be that, in the instant case, the notice *now* afforded an employee is indefinite (Appellant's Br. 21), that is not to say that now it is no notice at all or that, as time goes on, it will not become definite and positive notice that his job is in jeopardy; nor is it to say that, in most of the many situations to which the statute applies, such notice, prior to the actual impact of adverse effects, is not from the start entirely effective and helpful to the employee. As will be later pointed out, the legislative history of section 5 (2) (f) shows that it is an important purpose of the provision to give "railroad workers protection against sudden dismissal." There is something not too convincing in argument that where an employee is put on notice that he will be no longer needed 4 or 5 years hence, he is hurt because he is assured of his job for those years instead of being at once dismissed with dismissal compensation while he searches for another. Appellant's argument assumes that immediate dismissal is the standard, whereas there are few cases in which that is so and it is obvious that there will be many where dismissal or other adverse effects will be long deferred and varying. It cannot be attributed to Congress, which has frequently dealt with section 5 transactions, that it was without knowledge of the varying situations.

Moreover, while for the most part dismissals will result from abandonments of lines or operations, the order does not provide, as alleged in the complaint (R. 5), that "no abandonment of lines or operations would be permitted until such construction was completed." Nor is the statement in the brief (19) as to this entirely sufficient. The order actually provides (R. 42) that "none of the lines or operations herein permitted to be abandoned may be abandoned until operation is substituted over lines herein authorized to be constructed, acquired, or jointly used or owned". Appellant asserts in its brief (p. 19) that the overwhelming majority of employees who will be adversely affected will not be so affected until after the employee protective period has expired. The Commission's report says (R. 27):

> The estimates indicate a net displacement of about 350 employees, of whom 9 are bridge tenders and about 108 are crossing watchmen now employed on tracks which will be retired or over which train and yard movements will be reduced; but the opinion is expressed that the number eventually displaced will not exceed 300.

Doubtless, for the most part the adverse effects upon employees will not result until after completion of the project, this particularly with respect to station employees. But the project is extensive, with many ramifications, including not only abandonments of lines to eliminate grade

crossings within the city but also other abandonments and numerous transactions for joint use and acquisition of lines and new construction of track, yards and lines. Plainly neither the Commission's order, nor the city and railroads' plan, contemplate that all abandonments or other important steps are to be deferred until after completion of the project.

Appellant's brief, while emphasizing that the question before the Commission and this Court was and is as to the proper interpretation of section 5 (2) (f), seems, at the same time, to urge that the Commission should have approached the question from the standpoint of what, in the circumstances, it would deem equitable and grant as a labor protective period. Probably this confusion results from appellant's view that the Commission is vested with discretion to extend indefinitely the protective period beyond the 4 years specified. But it serves to illustrate that the construction given the statute by appellant would ask the Commission to substitute its judgment for that of Congress.

Appellant asserts that its construction of the statute is shown to be correct both by the statute's language and its legislative history. But, so far as the language of section 5 (2) (f) is concerned, it plainly does not authorize the Commission to prescribe any protective period other than that "of four years from the effective date of" the Commission's order of approval, this being quali-

fied only by the exception to the effect that, where an employee's employment prior to the effective date of the order has been for less than 4 years, then, the Commission, in the case of such employee, is not to require the protective period subsequent to such date to continue for a period any longer than that of the employee's prior employment. Since the exception limits even the length of the 4-year protective period, it follows, it would seem, that the period of 4 years from the effective date of the Commission's order of approval is as long as the statute contemplates may in any case be provided for, and, also that this may not be avoided by making the 4-year, or any, protective period run, not from the effective date of said order, but from the date each employee is adversely affected.

(a) The authority placed with the Commission, whether by the first, or the second, sentence of section 5 (2) (f), is of the same type or kind, namely, administrative

Appellant asserts (Br. 12) that the first sentence of section 5 (2) (f) vests discretion in the Commission to determine what will constitute a fair and equitable protection for employees; that the provision makes mandatory a fair and equitable arrangement but leaves with the Commission discretion to determine the nature and extent in time of the particular type of protection to be afforded; and it further asserts:

> The second sentence does not provide the standards for the first sentence as held by

the District Court, but provides specific protection both of type and extent which the Commission is required to impose. The specific type of protection is that the employee shall not be in a "worse position" with respect to his employment, and the extent in time this type of protection is required is four years from the effective date of the Commission's order, with a proviso that a longer period shall not be required than the period during which the employee was in the service of the carrier prior to the effective date of the Commission's order.

For the convenience of the Court the provisions of section 5 (2) (f) are again set forth as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required

to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The authority placed with the Commission, whether by the first or the second sentence of section 5 (2) (f), is of the same type or kind, namely, administrative. Although the second sentence, as a guide to the Commission's administrative judgment in arriving at the fair and equitable arrangements, terms, and conditions referred to, establishes the broad standard that the carrier transaction approved shall not result in employees *being in a worse position with respect to their employment,* and also fixes the protective period as 4 years from the effective date of the approval order, the sentence plainly does not provide a specific type of protection, not left to the Commission's discretion but made statutory. That is to say, the sentence can hardly be said to spell out and thus make statutory the precise protection to be thereunder afforded. It makes statutory the 4-year protective period

specified; but, as stated, the provision against employees being placed in a worse position with respect to their employment sets up a broad administrative standard for the Commission's general guidance in arriving at the fair and equitable protective arrangements or conditions. The standard of protection is obviously high but the arrangements giving effect thereto are nevertheless not spelled out but, similarly as in the case of other administrative standards, are left for the detailed carrying out to the Commission's experienced judgment.

As shown in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672, 675, there are three classes of cases which arise under section 5 (2) (f): (1) cases in which it is definitely shown that no employees will be affected by the carrier transaction proposed; (2) cases in which it is not definitely shown that employees will not be affected; and (3) cases (such as the case here) where it appears that employees will be affected. In the first two classes of cases the Commission imposes conditions in the language of the statute, that is (as shown in the said merger case), it makes its approval of the carrier transaction

> Subject to the conditions that—
>
> During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse

position with respect to their employment * * *. (See p. 675.)

Since, in the first two classes of cases, adverse effects on employees are remote, this form of condition in the language of the statute is regarded as adequate. Nevertheless, in the event that such adverse effects should result, it is apparent that the language of the statute would have to be implemented by detailed conditions or arrangements such as, or similar to, those set forth in Exhibit B to the complaint. Said language, it can readily be seen, does not itself spell out with such degree of certainty as to make statutory any particular arrangements, terms, and conditions. On the contrary, the fact that the statute directs the Commission to include in its order of approval conditions that such transaction will not result in employees being in a worse position with respect to their employment affirmatively shows that such ensuring of employees against being placed in a worse position with respect to their employment is an administrative standard for the Commission's guidance in formulating and prescribing the employee protective conditions or arrangements. In short, in the two classes of cases in which the Commission imposes labor protective conditions simply in the language of the statute, that language, if occasion arose, would still have to be implemented by detailed conditions or arrangements. And, of

course, in the class-3 cases—the cases (such as the case here) in which it is shown that employees will be affected—the Commission has always treated the language as an administrative standard, in that it has prescribed in detail and along with its order the conditions or arrangements which in its judgment gave effect thereto. *Chicago & N. W. Merger Case, supra,* p. 675; *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177. 197-201; *Chicago, B. & Q. R. Co. Abandonment,* 257 I. C. C. 700; *Texas & P. Ry. Operation,* 247 I. C. C. 285, 295, and others.

Appellant's theory is, it may be, that with both the type of protection under the second sentence, as well as the protective period, regarded as statutory and fixed by Congress, then it is more readily possible to treat the Commission's authority under the first sentence of section 5 (2) (f) as a distinct and separate thing and, therefore, not governed by the 4-year protective period specified, with which, of course, appellant's argument is chiefly concerned. But, it is not necessary to labor the question, for it is obviously not the fact that Congress itself has determined and spelled out in the statute the detail necessary to the protective measures and arrangement leaving nothing to the Commission's administrative discretion. Accordingly, accepting as it seems apparent is the case, that the language in the second sentence sets an adminis-

trative standard, then appellant's contention that it is distinct in type from the fair and equitable protection required in the first which it asserts places unlimited discretion wth the Commission, means that appellant is in effect urging that Congress has supplied two distinct and different administrative standards (in the matter of the type of employee protection) to guide the Commission in formulating an employee protective arrangement to be imposed as a condition to its approval or authorization of any transaction involving a carrier or carriers by railroad. Appellant contends (Br. 13) that said requirement, or standard, of the second sentence that employees are not to be placed in a worse position with respect to their employment and the other requirement of the sentence limiting the protective period to 4 years "constitute minimum requirements below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence but beyond which it is free to act if the circumstances of a particular case require a more extended period." True, the standard that employees will not be placed in a worse position with respect to their employment, although one requiring full employee protection, still is a minimum requirement below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence. But

the emphasis placed by appellant on its being a minimum requirement implies that appellant considers that the Commission acting under authority of the first sentence (isolated from the second) is empowered to formulate and prescribe a fair and equitable protective arrangement which would do more for the employees (Br. 27), placing them in a better position (than the present) with respect to their employment, and this, too, without limit in point of time imposed on the Commission (Br. 13). Doubtless this is not intended, but it serves to emphasize, if emphasis is necessary, that Congress has not supplied two distinct standards for administrative guidance, but that the fair and equitable employee protective arrangement required by the first sentence is the full employee protection set as a standard by the second, and that being so, that the Commission is not empowered to extend the protective period at will but is limited by the same standard to the 4-year period.

Surely any terms and conditions which, as expected by the second sentence, would ensure employees from being placed in a worse position with respect to their employment must be fair and equitable employee protection, at least if unlimited in point of time. And an examination of the protective arrangements prescribed by the Commission will show that the Commission has endeavored to ensure full employee protection

just as expected by the administrative standard laid down in the second sentence of the statute.

Appellant says that the Commission's construction of section 5 (2) (f) disregards the cardinal rule that the parts of a statute must be considered in relation to each other so that the whole may be given reasonable effect. The truth is that it is not appellant's construction but that of the Commission which, not only observes such cardinal rule, but gives to the statute a normal reading and construction. As demonstrating this, it will be seen that the first sentence of section 5 (2) (f) provides generally that, as a condition of its approval of a carrier transaction, the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence lays down the standard to govern such equitable arrangements or conditions, providing, in effect, that they shall be such that the employees will not be placed in a worse position with respect to their employment—really full protection.[1] But it is

[1] If the provision in the first sentence requiring *fair and equitable arrangements to protect employees* stood alone, the Commission would have only that criterion for its guidance, but would, nevertheless, have to apply it to the best of its judgment. But the provisions of the first sentence do not stand alone, for, in the second, Congress has supplied a closer, although still broad and general, guide to the meaning it wants attributed to "the fair and equitable arrangements" to protect employees, namely, the standard that dur-

limited in point of time, namely, to 4 years from the effective date of the approval order. And then there is the last sentence of section 5 (2) (f) which might be termed a saving clause, permitting employees and carriers to iron out by agreement such situations as seem to them to require it. So that, the construction given the statute by the Commission does observe the cardinal rule of construction referred to by plaintiff. In fact, under that construction, each provision dovetails in purpose with the others and with the purpose of the provisions as a whole.

(b) Legislative history

All that has been just above said, is clearly borne out and confirmed by the legislative his-

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ing the four-year period they are not to be in a worse position with respect to their employment.

Only in Section 5 (2) (f) of the I. C. Act and in Section 77 of the Bankruptcy Act (railroad reorganizations) has Congress used the criterion, or standard, "fair and equitable," to guide and govern the Commission's administrative judgment. As shown in *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, the phrase "fair and equitable" has judicial meanings attached to it, and, if the Agency purports to base its action on such judicial meanings alone, it must adhere to, and apply, them correctly (p. 88). But, as also shown in that decision, the phrase "fair and equitable," as used as a standard in an administrative statute, has its own meaning (p. 94), and the Agency may evolve criteria of fairness and equity to effectuate the legislative policy (p. 89) and apply them. Cf. *N. Y. Cent. Securities Co.* v. *U. S.*, 287 U. S. 12, 25. Surely, if an agency of Congress may do this, Congress itself may, as here, supply a closer guide to the meaning it wants attributed to "fair and equitable" than is afforded by the phrase itself.

tory of section 5 (2) (f) and particularly by the last stages thereof. As shown in the brief of the railroad interveners (pp. 14–16), the bill to amend section 5, as passed by the Senate, contained a provision practically the same as that in the first sentence of section 5 (2) (f). However, the House bill adopted the so-called Harrington amendment which as a practical matter would have precluded authorization of transactions under section 5 (2) that would adversely affect employees. The conference committee met the situation by eliminating from the bill everything that bore upon consolidations, mergers, etc., which action would have left the law as it was, that is, would have left the Commission's authority to impose protective terms and conditions the same as it was when exercised in *Chicago, R. I. & G. Ry. Trustees Lease,* 230 I. C. C. 181; 233 I. C. C. 21, sustained in *United States* v. *Lowden,* 308 U. S. 225. See 86th Cong. Rec. 5881. The Conference Committee's action, however, proved unsatisfactory, particularly to advocates of the Harrington amendment (86th Cong. Rec., p. 5869), and it was strongly urged by the heads of five brotherhoods that the bill be recommitted to the Conference Committee. In submitting the proposals of the latter, Chairman Lea of the House Committee said in part (86th Cong. Rec., App. 2865):

> The letter proceeded to advocate recommitment of the bill and support of the pro-

posal to be offered by the gentleman from New York (Mr. Wadsworth). * * *

* * * * *

Three main proposals as the ground of recommitment are suggested. The protection that Congress can legally and lawfully give to dismissed employees is confirmed by the authority of the Commission as decided by the Supreme Court.

The proposal to indefinitely place unemployed labor in a position no worse than when its employment ceased regardless of the length of service, the financial condition of the employer, or the need of employment is a fantastic proposal.

* * * * *

The House did recommit the bill to the conferees, May 9, 1940, with instructions, among others, to insist upon a modified Harrington amendment. The motion to recommit, passed by the House was offered by Congressman Wadsworth and read in part (86th Cong. Rec., p. 5886):

3. That the managers on the part of the House insist on the inclusion in the report of the committee of conference the provisions adopted by the House relating to combinations and consolidations of carriers (secs. 8 and 22 of the House amendment) but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment, read as follows:

(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment.

Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

It will be noted that the above proposed section 5 (2) (f) would have required the Commission to prescribe the employee protective arrangements, not only as a prerequisite to its approval of consolidations, mergers, etc., in respect of rail-

roads, but also as a prerequisite to its approval "of the substitution of another means of transportation for rail transportation proposed to be abandoned." Except for this, however, it is clear that the above section 5 (2) (f) which the House conferees were instructed to insist upon was practically the same as section 5 (2) (f) of the Act as it now stands enacted into law, save only that it contained no provision limiting the time of the employee protection afforded. The motion to recommit shows that the whole proposed section 5 (2) (f) including the first, as well as the second, sentence, was offered as a modified, or substitute, Harrington amendment. It was rejected by the Conference Committee in the particulars that it sought to provide employee protection unlimited in point of time and would have placed employees having short periods of employment on the same footing as others (86 Cong. Rec. 5869, see also Chairman Lea's statement above given); and the committee also omitted its provision which would have required the Commission to prescribe the protective arrangements as a prerequisite to approval "of the substitution of another means of transportation for rail transportation proposed to be abandoned." But, except for these changes the provisions of section 5 (2) (f), as recommended for adoption by the second Conference Committee report (and which were later enacted by Congress) were practically the same as those of the substitute Harrington

amendment which the House directed its conferees to insist upon. The Conference Report (Report 2832, pp. 68–69), following the setting out of the present section 5 (2) (f) which it recommended for adoption, contains the following statement:

> The substitute proposal for the Harrington amendment as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute amendment agreed upon in conference.
>
> The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration.
>
> The conference agreement on the Harrington amendment includes a provision of this instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in

> a worse position with respect to their employment. The conference agreement, however, qualifies this provision by confining its operation to a period of four years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.
>
> In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement, the benefits to employees will be required to be paid for not longer than four years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation.

Speaking of the above statement in the Conference Report, appellant's brief (pp. 47–48) says, in substance, that it is clear that in the minds of the conferees the first and second sentences were regarded as wholly distinct; that,

while the first sentence was mandatory in its requirement of an equitable arrangement for the protection of employees affected, it was discretionary in the sense that the nature and extent in time of the protection was left to the Commission to decide; that, on the other hand, the second sentence deals with a specific type of protection expressly stated by the conference report to be a separate provision. Such interpretation of section 5 (2) (f) has been above discussed (pp. 23–30). The paragraphs of the Conference Report hardly warrant plaintiff's statements and particularly the last paragraph directly refutes appellant's views, in that it shows that the conferees regarded the provisions of the substitute Harrington amendment as an inseparable whole, making all employees equal beneficiaries of its provisions and requiring the carriers to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. As above stated the House motion to recommit shows that the proposed section 5 (2) (f), including both its first and second sentences was, as a whole, offered as a substitute Harrington amendment. And further refuting appellant's contentions, Congressman Lea, chairman in charge, in explaining the bill on the floor of the House said (86 Cong. Rec., p. 10178):

> The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of

> the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.

Although the Statute as enacted, the bill as finally placed before Congress and repeated statements of members make plain that the protective period means from the effective date of the order of approval, there is some argument to the contrary. In this connection the response of Chairman Lea to direct questions from Congressman Vorys are pertinent (Cong. Rec., Vol. 86, p. 10178, Aug. 12, 1940):

> Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?
>
> Mr. LEA. No; this rule does not delay consolidation. *It means from the effective date of the order of the Commission the benefits are available for 4 years. The*

order determines the date, and the protective benefits run 4 years from that date. * * * [Emphasis added.]

Also pertinent is the following from a report of the activities of the Brotherhood of Railroad Trainmen in connection with the legislation, published in 1940 under title "The Transportation Bill":

> President Whitney began the battle single-handedly, without the support of any of the other twenty standard railroad labor organizations. He caused the bill to be changed from one that permitted consolidations of the railroads, without public hearings and with no tangible protection to labor, to one that prohibits the Interstate Commerce Commission from approving any consolidations of railroads, without public hearings and unless they make a part of their order the positive requirement that no railroad worker will be placed in a worse position with respect to his employment, as a result of consolidation, *for a period of four years following approval by the Commission,* except that those employees who have less than four years of service shall receive protection for a period of time commensurate with their period of service. But even the employees who have a short period of service are enabled to lengthen that period of service during the consolidation proceedings, *as the protection period of the law begins on the date of final approval by the*

> *Commission.* In other words, if an employee has two years of service at the time the railroads make application for consolidation and there is a period of two years during which the consolidation procedure is before the I. C. C. and before final approval by the Commission, such employee would get the full protective period of the law. [Emphasis added.]

2. Decisions of the Commission

It is well settled that the construction contemporaneously given an administrative statute by the body charged with its administration is entitled to great weight. As early as *Texas & P. Ry. Co. Operation* (decided July 1941), 247 I. C. C. 285, the Commission treated the provision in the second sentence, directed against employees being placed in a worse position with respect to their employment, as a guide to, and as governing, the fair and equitable protective arrangements required by the first sentence (pp. 294–295) and always it has limited the protection afforded to a period not extending beyond 4 years from the effective date of its approval orders. See also *Oklahoma Ry. Co. Trustees Abondonment,* 257 I. C. C. 171, 198–201; *Chicago B. & Q. Ry. Abandonment,* 257 I. C. C. 700, 704–707; *Cleveland & P. R. Co. Purchase* (decided May 1941), 244 I. C. C. 793, 795–796. This latter is the earliest case under section 5 (2) (f) and

it is apparent that the Commission was governed by the same reading of the statute.

The carrier transactions which by section 5 (2) are subjected to the Commission approval are varied in kind and the situations that may be involved in each kind are also very varying. It must be assumed that Congress had these considerations in mind in providing for employee protection both as to type and in fixing the protective period, whereas appellant, to meet one particular situation, is asking that the statute be distorted and left uncertain as to all; that it be construed to provide for a sort of dual type of administration (not very clearly explained) and to authorize the Commission to change the 4-year period specified to protective periods commencing with the time each employee is adversely affected by the transaction. What might result from such a construction is illustrated by the contentions of the Railway Labor Executives' Association in *Chicago & N. W. Merger*, 261 I. C. C. 672, already discussed at pages 11 and 12, *supra*. There the Association, an intervener, in urging the Commission to impose conditions in the language of the statute, contended that, since the provisions of section 5 (2) (f) were mandatory, they required the Commission to impose conditions in every case "even though it may appear, as in this case, that at the time of the transaction no employees will be affected." And it, in effect, suggested

that "while adverse effects on employees cannot be foreseen at this time" still they might result in the unforeseeable future. There is enough truth in this suggestion to show, it would seem, that Congress proceeded on sound grounds in providing that the 4-year protective period run from the effective date of its approval order and not from the date of adverse effects on employees.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

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JANUARY 1950.

APPENDIX A

Section 5 (2) of the Interstate Commerce Act

(54 Stat. L. 905, 49 U. S. C. § 5 (2))

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or

carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

BRIEF FOR THE RAILROAD INTERVENORS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 337.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Columbia.

BRIEF FOR THE RAILROAD INTERVENORS.

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BRIEF FOR THE RAILROAD INTERVENORS.

OPINION BELOW.

The opinion of the court below (R. 69) is reported in 84 F. Supp. 178. The report of the Interstate Commerce Commission (R. 10) is published in 267 I. C. C. 763.

JURISDICTION.

The judgment and decree of the three-judge district court below was entered on June 17, 1949 (R. 72). Petition for appeal was presented and allowed on August 16, 1949 (R. 73-74). The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. Code, Sections 1253 and

2101(b). Probable jurisdiction was noted on October 24, 1949 (R. 80).

COUNTERSTATEMENT OF QUESTION PRESENTED.

The single question presented for decision is whether the court below erred in ruling that the Interstate Commerce Commission was right in holding, as a matter of law, that the fair and equitable arrangement contemplated by Section 5(2)(f) of the Interstate Commerce Act is measured by the specifications therein of a protective period of four years from the effective date of its order approving a transaction within the scope of Section 5(2) of the Act.

STATUTE INVOLVED.

The statutory provision involved in this case is Section 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), which provides as follows:

> "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The provisions of Section 5(2) of the Interstate Commerce Act are also set out in full in Appendix A of this brief (pages 30-32).

STATEMENT OF THE CASE.

The statement of the facts and of the proceedings before the Interstate Commerce Commission and in the courts below set out in the appellant's brief (Bf. pp. 4-9) is substantially correct.

The first paragraph of the "Statement" in appellant's brief (Bf. p. 3), however, is argumentative and the statements made therein are not admitted by intervenors as sound in fact or law. The Commission did not impose conditions "purportedly for the protection of all employees dismissed and displaced", nor is it true that "only a few of the employees will receive any protection". (Bf. p. 3). On the contrary, the Commission imposed the conditions as the "fair and equitable arrangement contemplated by Section 5(2)(f)" and said that the "benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorization herein granted." (R. 32). The appellant by mistaking the nature of the conditions imposed is thus led to draw the improper and untrue conclusion that "only a few of the employees will receive any protection." (Bf. p. 3). As we will show, all the employees affected by the project authorized by the Commission will receive and already are enjoying the protection contemplated by the plain terms of the statute and the intent of Congress in passing the law to provide protection against sudden dismissal and long unemployment for a period of four years from the effective date of the Commission's order.

It should be pointed out that the parties who would be adversely affected if the appellant's contentions should be adopted by this Court are the City of New Orleans and the eleven railroad companies who are cooperating with the City in establishing a union passenger terminal in lieu of

the present five stations now in use and in eliminating many grade crossings within the City. These parties were the applicants in the proceedings before the Commission, and they have intervened in this case to support the order of the Commission as in the public interest and in no way contrary to the laws of the land. The position of these intervenors (hereafter sometimes called "railroad intervenors") is stated in their answer as follows:

> "In further answer to the allegations of Paragraph 14 of the complaint, railroad intervenors allege that the protective period of four years provided in the conditions pertaining to employees adversely affected does provide adequate and real protection to any and all employees who may be affected by the consummation of the projects as authorized by the Commission, all as required and provided by Section 5(2)(f) of the Interstate Commerce Act." (R. 58)

SUMMARY OF ARGUMENT.

The lower court and the Interstate Commerce Commission have correctly interpreted the governing statute in holding that the Commission is without power to impose protective conditions in an order approving a transaction under Section 5(2) of the Interstate Commerce Act for a period in excess of four years from the effective date of its order on the following grounds:

(a) The four year period of protection is prescribed by the clear and unambiguous language of Section 5(2)(f) of the Act.

(b) The legislative history confirms and fortifies this interpretation which the plain language of the statute demands.

(c) The time limitation imposed is fair and equitable and complies with the statutory mandate.

The interpretation urged by the appellant would not only be contrary to the clear language of the statute and the intent of Congress as shown by the legislative history, but

would also deny the carriers the fair and equitable arrangement assured them by Congress by extending the period of protection as high as eight, nine or more years. The Commission's order providing for a fixed period of protection of four years from the effective date of the order is completely fair and equitable and in full compliance with the mandate of the statute.

ARGUMENT.

I. The Four Year Period of Protection is Prescribed by the Clear and Unambiguous Language of Section 5(2)(f) of the Act.

Prior to the enactment of the Transportation Act of 1940, 54 Stat. 902, there was no statutory requirement that the Interstate Commerce Commission impose conditions for the protection of employees affected by a consolidation or unification of railroad facilities in any required order of approval under the Interstate Commerce Act. In such cases, it was a matter purely within the discretion of the Commission, to be determined incident to its consideration of what "just and reasonable" conditions were necessary to support a finding that the proposed consolidation "will promote the public interest". This Court so held in *United States* v. *Lowden*, 308 U. S. 225.* The Commission, however, was not at that time required to attach conditions for the protection of labor and in many cases did not do so. As is pointed out in the *Lowden* decision, Congress was at that very time (1939) considering bills which would have made it mandatory upon the Commission to impose conditions for the protection of labor in all orders approving transactions of this type.

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* The order sustained in the *Lowden Case* provided certain benefits for employees adversely affected by a lease, "for a period of five years from the commencement of operation under the said lease," *not* five years from the time an individual employee is adversely affected as is erroneously stated (Bf. p. 18) in the brief of appellant. See 230 I. C. C. 181, at 187.

After lengthy hearings and debate, Congress included in the Transportation Act of 1940, an entirely new provision amending Section 5 of the Interstate Commerce Act with respect to the consolidation and merger of carriers. Section 5(2) of the Act as so amended is set out in Appendix A hereto in full. In summary, it provides that it shall be lawful for two or more carriers to consolidate or merge their properties, or any part thereof, with the approval and authorization of the Commission. After a public hearing, the Commission is authorized to enter an order approving and authorizing such a transaction if it finds, subject to such terms and conditions as it shall find to be just and reasonable, that the transaction "will be consistent with the public interest". The section directs that the Commission give consideration to the effect of the transaction upon adequate transportation to the public, the effect upon the public interest of the inclusion or exclusion of other railroads in the territory, the total fixed charges to result, and the interest of the carrier employees affected. Section 5(2)(f) specifically provides for the protection of employees to be adversely affected as follows:

> "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years *from the effective date of such order* such transaction will not result in employees of the carrier or carriers by railroad affected ~~by such order being in~~ a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions

of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (Emphasis ours).

The lower court correctly stated the issues raised by the pleadings in this case when it said:

> "The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f) of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that 'the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specifications therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f).'" (R. 71).

This Court therefore is called upon to decide only whether the lower court erred in refusing to set aside the Commission's order, for reasons which it stated as follows:

> "In our view the language of the statute in question is clear and unambiguous and the Commission's interpretation is correct. The first sentence thereof provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence prescribes the standard for such arrangements, namely that they shall be such that the employees will not be placed in a worse position with respect to their employment, and then proceeds to limit the time of such protection, namely four years from the effective date of the approval order. In addition, this interpretation is in accordance with the Commission's prior construction of the statute, and on that account is entitled to great weight. Finally, the legislative history set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute.

"We are therefore of the view that the motions for summary judgment filed by the defendants should be granted and the complaint should be dismissed." (R. 71-72).

Subparagraph (f) of Section 5(2) of the Interstate Commerce Act by clear and unambiguous language accomplishes the following with respect to all transactions covered by the section: *First*, it provides that the Commission must impose conditions on its approval which will provide a "fair and equitable arrangement to protect the interests of railroad employees affected". *Second*, it provides for the duration of such protection. *Third*, it permits such other protection as the parties might thereafter agree to.

The power of the Commission is discretionary insofar as the character of the conditions are concerned so long as they carry out the mandate that employees affected be not placed in a worse position for a period of four years from the effective date of the order but in no case for a longer period than the prior service of the employees before the effective date of the order.

Congress clearly required that the order *shall* include terms and conditions which provide protection for a period of four years from the effective date of the order. This mandatory requirement must appear in the order. Congress also required that the terms and conditions must nevertheless not give to employees a period of protection longer than the period of employment prior to the effective date of the order.

These provisions for time limitations can lead to only one conclusion and that is that Congress deliberately fixed the period of protection to start from the effective date of the order, not the date an employee is adversely affected. Thus, all employees are given up to four years, but not longer than their period of prior service (note that the statute prohibits the requirement of any protection whatsoever for employees hired after the effective date of the order), to readjust and overcome the expected effect of a

consolidation after they have been given fair notice through approval of the transaction by the Commission.

The Commission has followed this clear meaning of the statute consistently ever since the passage of the act in 1940, as is pointed out in its report in this case.* (R. 30-32). Indeed, this very same issue was raised by the appellant in the case of *Chicago, Milwaukee, St. Paul and Pacific R. Co., Trustees Construction*, 252 I. C. C. 49, 287 (1942) and 257 I. C. C. 292 (1944). On a reconsideration of the question by the full Commission, it was there said (257 I. C. C. 294):

> "Section 5(2)(f) prescribed a definite period of protection, namely, 'four years from the effective date of such order.' In our opinion, we have no authority to prescribe any other period in a case arising under Section 5(2)."

It would indeed take "compelling language in the statute itself" to warrant the rejection of the contemporaneous interpretation of the statute by the administrative agency charged with its execution, especially since it has now been consistently followed for a period of about seven years. *Maynard* v. *Elliott*, 283 U. S. 273, 277. See also *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116, and *Boutell* v. *Walling*, 327 U. S. 463, 470-471. Appellant has not shown any such compelling language in the statute as a reason for rejecting the Commission's interpretation of its powers and duties under the statute and thus disregarding the clear and unambiguous language used by Congress. In fact, the position of appellant can be sustained here only if the Court reads into the statute limiting words so that the prescribed period of four

* Appellant in its brief argues that the issue of the Commission's power was not contested in most of the cases, but it nevertheless remains true that the Commission has never prescribed the Washington Agreement Conditions since the passage of Section 5(2)(f), and has formulated an entirely different arrangement to assure the required protective arrangement along the lines of those prescribed in the order here under attack.

years from the effective date required in every order of the Commission becomes not a fixed four years, but a minimum of four years. Manifestly, the Court is not empowered to do this and so frustrate the clear intent of Congress as stated in unambiguous language.

Throughout appellant's brief, there is repeated over and over again a theme to the effect that "as the Commission and the lower court interpret Section 5(2)(f) however, the second sentence nullifies the first because the Commission claims it has no discretion but to follow the specifications of the second provision alone." (Bf. p. 13). A review of the fair arrangement prescribed by the Commission (R. 43-48) will refute that argument and theme, because it is apparent that in this case the detailed provisions of the arrangement go far beyond the bare requirements of the second sentence.

The arrangement prescribes in detail the manner in which payments are to be made to a displaced employee, that is one required to accept a less desirable job, so as to make him whole and protect his pension or annuity rights and seniority rights. It prescribes how dismissal allowances are to be calculated and paid to a dismissed employee. Moreover, the arrangement also provides for the preservation of existing rights such as free transportation, pensions, hospitalization, etc., reimbursement for moving expenses of displaced employees, reimbursement for losses with respect to sale or disposition of a home, and for the arbitration of any disputes with respect to the conditions providing for the protection of the employees. These conditions constitute the "fair and equitable arrangement" required by the first sentence of Section 5(2)(f).

The Commission then goes on to follow the clear mandate of Section 5(2)(f) by providing, in accordance with the second sentence, that the period during which the protection is to be given shall extend from the date on which the employee is adversely affected to the expiration of 4 years from the effective date of the order, provided, however,

that such protection is not to continue for a longer period following the effective date of the order than the period during which the employee was in the employ of the carriers prior to the effective date of the order. (R. 44) Thus, the fair arrangement gives full meaning and effect to the clear and unambiguous language of the statute by implementing both the first and second sentences of the statute which together form the mandate of Congress.

Although the appellant admits that the precise issue in this case has never before been considered by the courts, it refers in its brief to the decisions of this Court in *United States* v. *Lowden*, 308 U. S. 225 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, as interpreting the "*intent*" of Congress in enacting the provisions of Section 5(2)(f) contrary to that "urged" by the Commission. (Bf. p. 57). Neither of these cases considered the question of the duration of the protective period required by the 1940 amendments; and it is difficult indeed to find any language in the opinions even remotely relating to the issue now before the court.

In the *Lowden Case*, the Court had under consideration the power of the Commission to impose, in its discretion, conditions for the protection of labor in approving a consolidation under Section 5 of the Act as it existed prior to the 1940 amendments. The only reference the Court made in that decision to the legislative history here under consideration was to observe that Congress at the time of that decision was considering bills to make mandatory such provisions in consolidation orders of the Commission. Obviously, the Court could not have reached a conclusion as to Congress' intent months before the extensive debates were concluded and the law was enacted.

The second case, *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, was limited to the question of the power of the Commission to impose conditions for the protection of labor in abandonment cases under Section 1(18)-(20) of the Act. There it was contended

that Congress had ratified the Commission's construction of Section 1(18)-(20) as not giving it the power to provide such conditions when it failed to amend the law as recommended by the Commission. After holding it could not impute to Congress' failure to act any such significance, the Court said:

> "Nor is the petitioners' contention strengthened because Congress did modify § 5(4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary. See *United States* v. *Lowden*, *supra*, 239. To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly." (315 U. S. 373, 379)

There is nothing in this language to support the argument that Mr. Justice Black, in using the foregoing language, meant that Congress intended to set up two kinds of mandatory protective conditions when it enacted Section 5(2)(f). His language is perfectly clear. All he said was that Congress intended to make the protection mandatory and not discretionary as it had been in the past. No attempt was made to determine the character and duration of the protection that Congress made mandatory by the 1940 amendments. This was done by the Commission when it interpreted the statute in *Chicago, Milwaukee, St. Paul and Pacific R. Co. Construction*, *supra*, as is pointed out in its opinion in this case (R. 30), by following what we submit is the clear and unambiguous language of the statute.

II. The Legislative History Confirms and Fortifies the Interpretation Which the Plain Language of the Statute Demands.

In the preceding section of this brief we have shown that the language of Section 5(2)(f) is plain and unambiguous. Accordingly, resort to the legislative history of that provision is unnecessary. As said in *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278:

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

After thus rejecting the competency of legislative history to alter or vary the plain meaning of a statute, the Court in that case went on to refer to that history as corroborating the conclusion reached from the terms of the statute itself. In the present case, our attitude with regard to the use of the legislative history is based squarely on the reasoning in the decision just discussed. We think that Section 5(2)(f) is so clear as to need no extraneous aid to construction; but since its meaning has been called into question, we think it proper to invite attention to the legislative history to confirm and fortify the interpretation which the plain language of the statute demands and which the Commission and the court below have given it in the order now under review.

The legislative history begins with the year 1938 when the railroads in the United States unsuccessfully sought a reduction in the wages of their employees in a case that was submitted to an Emergency Board appointed by the President as provided in the Railway Labor Act. (45 U. S. C. §§ 151-188). As a result of the Emergency Board's recommendation, the President appointed a committee of six, consisting of three railroad officers, Messrs. Clement, Gray and

Norris, and three labor executives, Messrs. George M. Harrison, President of the Clerks, B. M. Jewell, representing the Shopmen, and D. B. Robertson, President of the Firemen, to confer and to make recommendations with respect to legislation which might improve the railroad situation.

This committee brought in a report bearing date of December 23, 1938, commonly known as the Committee of Six Report. The report, which was signed by all six members, and was later approved by an affirmative vote of all twenty of the Brotherhoods belonging to the appellant Railway Labor Executives' Association, recommended among other things a liberalization of the law with respect to consolidation, subject to the following condition:

> "*The interests of the employees affected.*
>
> The Board* shall examine into the probable results of the proposed consolidation and require as a prerequisite to its approval a fair and equitable arrangement to protect the interests of the said employees."

Thereafter, a bill was prepared to carry into effect the recommendations of the Committee of Six. This bill was introduced in the House by Representative Lea as H. R. 4862, 76th Cong., 1st Sess., providing in the section pertaining to consolidations:

> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." (p. 148)——

A somewhat different bill, S. 2009, was introduced in the Senate by Senator Wheeler, but it contained the exact language quoted above with respect to protection to be required in the case of unifications. This provision remained unchanged when the bill passed the Senate on May 25, 1939.

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* The Committee of Six recommended that the Commission's jurisdiction over mergers and consolidations be transferred to a proposed Transportation Board. The entire report is reprinted on pages 257-308 of *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862.*

The House Committee, after lengthy hearings, completely rewrote the Senate bill and reported a bill which, however, still contained the identical language quoted above with respect to labor protection, and which represented what had been agreed to between labor and management.

As passed by the House, however, the bill contained the so-called Harrington Amendment, which consisted of a proviso reading:

> "Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of a carrier or carriers or in the impairment of existing employment rights of said employees." *

It will be noted that the bill as passed by the Senate left the protection of labor entirely up to the discretion of the Commission so long as it provided a fair and equitable arrangement. On the other hand, the bill passed by the House (with the Harrington Amendment) in effect denied the Commission power to approve any transaction within the scope of Section 5(2) which would result in adverse effect to employees. To work out these widely divergent views as to the protection of employees affected by consolidations (and many other matters not pertinent here), the two bills were referred to a conference committee.

Representatives of the railroads and of the Railway Labor Executives' Association (appellant here) advised the conferees of their opposition to the Harrington Amendment, which was being vigorously championed by President Whitney of the Brotherhood of Railroad Trainmen. After extended consideration, the conferees decided unanimously that they would meet the situation by leaving out of the bill everything that bears upon the subject of consolidation. In the Conference Report's discussion of the subject it was said in part:

> "These omitted provisions as to consolidation included the Harrington amendment which was adopted

* Cong. Rec., Vol. 84, pp. 9881-2, July 24, 1939.

on the floor of the House. This amendment was adopted by the House as a protection against displacement of employees due to the consolidations that might result from the provisions of section 5. Employees had a fear of unemployment and to some extent communities feared the loss of transportation due to the possible consolidations under present circumstances where a revival of the transportation industry might show that such consolidations were unwarranted.

* * * * * * * * * *

"In any event the elimination of the consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might otherwise have resulted from these provisions."*

Although the report does not so state, the Conference Committee undoubtedly was influenced in reaching its conclusion by the fact that this Court decided that the Interstate Commerce Commission had the power to impose such conditions as it deemed necessary in the public interest to protect employees as a condition of approving a consolidation under old Section 5(4) of the Act, when the decision in *United States* v. *Lowden, supra,* was announced on December 4, 1939, while the bills were in conference.

The advocates of the Harrington Amendment, however, were not satisfied, and the House recommitted the bill to the conferees on May 9, 1940, with instructions, among others, to insist on a substitute Harrington Amendment. During reconsideration, Senator Wheeler sponsored a compromise providing that a period of four years be fixed as a protective period.

The Conference Committee adopted such a compromise, but carefully fixed the exact time the period was to begin running as the *effective date of the order.* In addition, it limited the period of protection to not to exceed the length of the prior service of each individual employee. It also

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* Report No. 2016, April 26, 1940, House of Representatives, 76th Congress, 3d Session.

adopted an amendment providing that the employees and carriers might in the future make agreements covering protection of labor notwithstanding the provisions of the statute. This latter provision shows that the conferees desired to leave open to the employees an opportunity to secure through negotiations protection for a longer period than that required by Congress.*

When the Second Conference Report was under discussion in the House, Representative Lea, Chairman in charge, said:

> "The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.
>
> "There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred."**

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* See Report No. 2832, August 9, 1940, House of Representatives, 76th Congress, 3d Session.

** Cong. Rec., Vol. 86, p. 10178, August 12, 1940.

From this again, it is quite clear that the proponents of this bill intended to compromise the matter of the length of protection to be given labor by the Commission by specifying the period, leaving the parties free to negotiate a longer period if they desired to do so. If there were any doubt as to the time the four year period was to begin, Representative Lea removed it in the following colloquy with Mr. Vorys of Ohio:*

> "MR. VORYS of Ohio. Would this 4 year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4 year period during which the man would be paid.
>
> "MR. LEA: No; this rule does not delay consolidation. *It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.* * * *" (Emphasis added).

On the same day Chairman Lea made it clear that the language of Section 5(2)(f) was not designed to assure every dismissed or displaced employee a bonus of four years' pay, but rather was to assure employment or pay for a definite four year period following notice that an approved transaction would adversely affect employees; that is, following the effective date of the Commission's order approving the transaction. He said:*

> "MR. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his employment. Does 'worse position' as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?"

* Cong. Rec., Vol. 86, p. 10178, August 12, 1940.

"MR. LEA. I take that to be the correct interpretation of those words. Our conference agreement followed the instructions of the House in that respect. It gives railway labor generous *protection against sudden and long unemployment.* * * *" (Emphasis added.)

The last sentence of Mr. Lea's answer contains an important clue to the true intent of Congress in passing the statute for it is apparent that the purpose, as expressed in the final form of the bill, was not to provide unlimited employment rights to the affected workers, but rather it was to give them reasonable notice of pending demotions or loss of their jobs and assure them full protection for a maximum period while they made readjustments or provisions for new employment. The prohibition expressed in Section 5(2)(f) is not against demotion, displacement or dismissal, but against the *sudden* impact thereof. The same thought was expressed by Representative Wolverton, a member of the Committee which reported the bill, when he said:*

"Now as to the Harrington amendment, the conferees have adopted practically the same language originally adopted by the House, *but with a modification as to the length of time the conditions are to be effective.* * * *

"* * * It was recognized that the real intent of the sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into * * *.

"* * * Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers *protection against sudden dismissal* * * *" (Emphasis added).

After further discussion not pertinent here the bill was passed by both houses and was signed by the President on September 18, 1940. It thus appears without doubt that Congress not only used clear and unambiguous language to

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* Cong. Rec., Vol. 86, p. 10189, August 12, 1940.

express the intent of the compromise arrangement to dispose of the issue of labor conditions to be imposed in cases of railroad consolidations, but the legislative history supports the view of the Interstate Commerce Commission in this case that it is required to impose an arrangement to be effective for the specified period of four years, but not longer than the prior service of each employee, from the effective date of its order, and that it had no power to prescribe a longer protective period.

In a lengthy report of the activities of the Brotherhood of Railroad Trainmen with respect to this legislation, published in 1940 under the title "The Transportation Bill", the result is described in full accord with the above discussion as follows:

> "President Whitney began the battle single-handedly, without the support of any of the other twenty standard railroad labor organizations. He caused the bill to be changed from one that permitted consolidations of the railroads, without public hearings and with no tangible protection to labor, to one that prohibits the Interstate Commerce Commission from approving any consolidations of railroads, without public hearings and unless they make a part of their order the positive requirement that no railroad worker will be placed in a worse position with respect to his employment, as a result of consolidation, *for a period of four years following approval by the Commission*, except that those employees who have less than four years of service shall receive protection for a period of time commensurate with their period of service. But even the employees who have a short period of service are enabled to lengthen that period of service during the consolidation proceedings, *as the protection period of the law begins on the date of final approval by the Commission*. In other words, if an employee has two years of service at the time the railroads make application for consolidation and there is a period of two years during which the consolidation procedure is before the I. C. C. and before final approval by the Commission, such employe would get the full protective period of the law." (Emphasis added.)

While it is difficult to understand how any conclusion can be reached from this legislative history other than that it fully confirms and fortifies the interpretations which the plain language of the statute demands and which the Commission has given it in the order under review, appellant has attempted in a lengthy argument to show that the first two sentences of the section should be considered separate and apart from each other and interpreted as providing two distinct types of protection. To support this ingenious theory, appellant seeks to show that the proponents had two absolutely different purposes in mind. But such is not the case.

Both conference committees recognized the complete divergence between the labor provisions of the Senate bill and those of the Harrington Amendment of the House bill. The first Conference Committee, as we have seen, saw no way out of the dilemma but to drop all amendments in the bill looking toward a liberalization of the law with respect to consolidations and all reference to protection of labor in consolidations. This left unchanged the existing law, under which, as decided in the *Lowden Case*, the protection of labor in consolidation cases was completely within the discretion of the Commission. This was not satisfactory to many members of the House, who apparently felt that such protection of labor was inadequate, and the bill was recommitted to the second conference committee. The second conference report recommended a compromise between the two extremes. It neither left the Commission with a wide discretion as to the duration of the fair and equitable arrangement to be imposed, nor gave the employees unlimited protection for all time. It specified the period during which the protection was to run and made it mandatory that the order provide that the arrangement protect the employee for a specific period of four years from the effective date of the order.

That this was the purpose of the compromise was clearly stated in the second conference report and amplified in de-

bate by Representatives Lea, Wolverton, Vorys and others as set out above. Appellant apparently overlooked these important statements when it said the debate in the House refutes ~~supports~~ the Commission's construction.

Appellant also apparently overlooked the last sentence of Section 5(2)(f) when it said (Bf., pp. 15-16) the entire legislative history is devoid of any suggestion that the measure of protection agreed to by the carriers and the unions was to be modified or nullified by the compromise agreement. It is clear beyond a doubt that Congress was not satisfied with the existing situation and desired to take the matter into its own hands and specify the character and duration of the protection that was to be mandatory in the case of future consolidations. If there were any doubt, the provision that the parties may make agreements *in the future* as to protective conditions can mean nothing else but that Congress was preempting the field and intended to supersede any arrangements theretofore existing.

III. The Time Limitation Imposed is Fair and Equitable and Complies With the Statutory Mandate.

Appellant admits that the order of the Commission complies with the requirements of Section 5(2)(f), but contends that such compliance is only with the "minimum" requirements of that section, and that the Commission, in the exercise of its discretion, can and should go further and provide that the protective period for each employee should continue for a period of four years after the date he is actually displaced or dismissed by the consolidation. Appellant argues that the Commission's order "will operate to deny all protection to those employees who will be adversely affected", since, by reason of the four-to-five year construction period, many employees will retain their jobs until completion of the new terminal and therefore would not receive any displacement or dismissal allowance under the protective conditions imposed. That argument, we submit, is completely fallacious. Section 5(2)(f) provides that the

employees shall not be "in a worse position with respect to their employment" for four years—*not* that each employee is guaranteed displacement or dismissal compensation for four years. Congress did not intend that an employee should receive a displacement or dismissal allowance unless he was actually placed in a "*worse position*" during the protective period. If he remained on his job during that period and thereby sustained no adverse effect, he would receive no displacement compensation; but he would, in fact, have been receiving protection by reason of his continued employment, or as Congressman Lea put it, "protection against sudden and long unemployment."

The unsoundness of the appellant's contention in this respect may be demonstrated by the following illustrations:

Assume that a consolidation may be made promptly after the effective date of the Commission's order. Employees A and B, with over four years prior employment, both have average earnings of $400.00 per month. Employee A is immediately displaced to another position in which he earns only $375.00 per month. Employee B is not displaced, and continues to earn $400.00 per month. Under the Commission's order, Employee A would receive a displacement allowance of $25.00 per month, and Employee B would receive no displacement allowance. Plaintiff's contention is that Employee A is receiving protection, but Employee B is not. Of course, both employees have been protected; both have been made whole or kept whole with respect to their earnings.

Assume a second case, in which a consolidation would result in the ultimate displacement of ten employees, two immediately after the effective date of the Commission's order approving the consolidation, two after the first year, two more at the end of the second year, two more at the end of the third year, and the last two upon completion of the consolidation at the end of the fourth year. In such a case, assuming that each of the displaced employees was unable to secure employment paying as much as his old position, the first two employees would receive displacement

compensation for the entire four-year period, following the effective date of the Commission's order; the second two would receive such compensation for only three years; the third set of employees for only two years; the fourth pair for one year; and the fifth pair would receive no displacement compensation whatsoever. However, all ten would be receiving the protection that Congress intended during the entire four-year period.

The second example given above is illustrative of the consolidation at hand. It is estimated that the New Orleans Union Passenger Terminal will not be completed for four or five years. However, work on the construction has already commenced. One of the first undertakings is to fill the New Basin Canal and thereby eliminate the need for certain bridge tenders (R. 16, 27). If they are unable to secure employment paying equivalent wages, they will begin receiving displacement allowances within a few months. One by one, grade crossings will be eliminated, obviating the need for one to three crossing watchmen at each such crossing. As each is displaced he will begin receiving displacement compensation if it is necessary to make him whole with respect to his earnings. Other employees will not be displaced until completion date, in 1952 or 1953. Each will have been protected under the Commission's order. But all will have received complete protection against sudden dismissal or displacement for a period of four years following the effective date of the Commission's order. Those dismissed or displaced within the period will have received a displacement or dismissal allowance. Those not adversely affected until 1952 or 1953 will have been fully protected by the enjoyment of four years of employment at full pay.

Appellant's contention is inconsistent with the exception found in the second sentence of Section 5(2)(f) which must be included in the order whereby no employee is entitled to protection in excess of the period he was employed prior to the effective date of the order. This already means that no new employee shall be entitled to any protec-

tion and that those with short periods prior to the date of the order for no longer time after the date of the order than their prior period of employment. Of course Congress intended to thus protect the railroads from undue penalties and to reduce the protection accordingly for these short term employees by limiting their protective period below the full four year period.

Take the example of two employees, one with five years service prior to the effective date of the order and the other with three years, who are both displaced four years after the date of the order. The three-year employee would receive no compensation because his three year protective period had expired under the provisions of the law limiting the protection to a period not longer than the employee's service prior to the effective date of the order. The five-year employee, however, under appellant's theory would not only have had no loss for the first four years, but would be entitled to four more years compensation, thus in effect receiving 8 years protection after the effective date of the order. Of course Congress could have intended no such discriminatory result. The only reasonable construction of the law would be that neither would receive compensation since both have been kept whole for the full period after the effective date of the order and have thus been protected against the impact of sudden dismissal.

These illustrations, coupled with the legislative history, show the fallacy in appellant's reasoning. There is nothing in the language of the statute or its legislative history to indicate that Congress intended to leave the maximum period of protection to the discretion of the Commission. The whole legislative history shows that Congress found it necessary to fix a definite and prescribed period for keeping employees whole when a consolidation is approved by the Commission. As demonstrated above, the Commission's opinion and order of April 7, 1948 are completely in accord with that Congressional intent and with all the provisions of Section 5(2)(f) of the Interstate Commerce Act.

While the appellant admits that the order of the Commission complies with the basic requirements of Section 5(2)(f), it asks this Court to find that the order is invalid because the Commission failed to go further and provide a protective period *for each* employee to continue for a period of *four years after the date when he is affected by the transaction*. Appellant contends that this is necessary to provide a "fair and equitable arrangement for employee protection" because, as it alleges, the Commission's order will operate to deny all protection to those employees who will be adversely affected.

The record in this case shows that some 1022 employees will be affected by the transaction, representing the total number of employees of all the railroads involved whose work will be taken over by the Union Passenger Terminal. It is estimated that about 680 employees will be required by the Union Passenger Terminal, to be recruited from the 1022 employees as far as possible, leaving some 340 who would be completely displaced. Of these nine are bridge-tenders and 108 are crossing watchmen. (R. 27).

The Commission's order has now placed all 1022 employees in New Orleans on notice that they will be affected, and that some 340 jobs will ultimately be completely eliminated. The order also assures them a four year period (except for employees with shorter periods of prior service) from the effective date of this notice in which to arrange their affairs in the light of the approved transaction and its anticipated effect on them. During this four year period they must be made whole through protection against economic loss in their employment because of the transaction. This is certainly fair and equitable to the employees and is in accord with the standards fixed by Congress.

As has been shown above, the present provisions of Section 5(2) of the Interstate Commerce Act were enacted as a part of the program to improve the position of the railroads. Its provisions were intended to make it feasible for

railroads to consolidate and merge their properties for more economic operations. Congress, however, desired to prevent such transactions from being unduly burdensome on employees and to avoid the sudden impact of unemployment that might result. It therefore required arrangements to be made for the protection of the employees for a four year period after the effective date of the approval. This was the period which Congress determined was fair and equitable to all the parties; both the railroads and the employees. The provisions of Section 5(2)(f) requiring a fair and equitable arrangement clearly contemplate that the arrangement must be fair and equitable to both railroads and their employees.

But the appellant asks that this Court in effect direct the Commission to modify its order in such a way that it will become unfair and inequitable to the railroads, and also be contrary to the provisions of Section 5(2)(f).

As has been shown, the Commission has held in this case that Section 5(2)(f) limits the period of protection to four years after the date of the Commission's order. Appellant has asked, however, that the four year protective period not start until the individual employee is adversely affected. This would violate the statute in two ways. First, it would fail to comply with the mandate that the order must provide that the protection start with the effective date of the order; and second, it does not comply with the mandate that the conditions shall not provide protection to any employee for periods in excess of his service prior to the effective date of the order. To omit these provisions from the protective conditions would result in denying the railroads the fair and equitable arrangement assured them by Congress, keeping in mind that the essential purpose of the Transportation Act of 1940, of which Section 5(2)(f) was a part, was to give relief to the hard-pressed railroads.

Instead of giving all employees the uniform four-year notice and protection, appellant's suggested modification would provide varying periods of protection. In some

cases, the period would extend to 8 or 9 or perhaps more years after the date of approval of the transaction. To illustrate, some employees might not be displaced until some months after the consolidation takes place. It has been shown that the passenger terminal will not be ready for operation for four or five years and that only a few of the employees will be displaced or dismissed prior thereto. So, in such cases it will be seen that the period of protection afforded by appellant's proposal would run up to 8 or 9 years. Such results are manifestly unfair and inequitable and would defeat the purpose of Congress in enacting the present provisions of Section 5(2) of the Interstate Commerce Act.

The fallacy in appellant's argument on this branch of the case lies in its assumption that a provision for the protection of employees is not fair or equitable unless it gives them four years of dismissal pay. This overlooks the fact that an employee is fully protected when he is employed at full pay for four years after the Commission has approved a transaction under Section 5(2), and when the employee accordingly knows that ultimately there will be an adverse effect on employment. Certainly there is nothing unfair or inequitable about giving an employee four years of employment at full pay as a "looking around" period during which he may make provision against the adverse situation which he has been put on notice is coming.

An examination of the record thus shows that the Commission's report and order of April 7, 1948 does comply with all the provisions of Section 5(2)(f) and provides a fair and equitable arrangement with regard to employees who will be adversely affected by the transaction. On the other hand, the modification suggested by appellant would not only be contrary to the law, but would fail to provide a fair and equitable arrangement in fact, as well as under the tests laid down by Congress as statutory limitations on the Commission's powers in fixing fair and reasonable limits for protection.

CONCLUSION.

For all the reasons and upon the authorities above set out, we respectfully submit that the order of the court below granting the defendants' motions for summary judgment and dismissing the complaint because the Commission's report and order of April 7, 1948 are in complete accord with the provisions of Section 5(2)(f) of the Interstate Commerce Act, and provide a fair and equitable arrangement for the protection of employees as intended by Congress under Section 5(2) of the Act, should be affirmed.

Respectfully submitted,

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APPENDIX A.

Section 5(2) of the Interstate Commerce Act.

(54 Stat. L. 905, 49 U. S. C. § 5(2))

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifi-

cations as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will

result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 337.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Columbia.

BRIEF OF RAILROAD INTERVENORS IN REPLY TO BRIEF FOR THE UNITED STATES.

HARRY MCCALL,
HENRY L. WALKER,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In its brief for the United States, the Department of Justice asks this Court to reverse the judgment which the Department took the lead in procuring in the court below.

Nowhere in its brief does the Department undertake to justify its complete change of position here from that which it occupied below.

In its brief the Department describes the construction which the Commission and the court below have given the statute here involved as "an absurd interpretation" (p. 4). Yet in the court below the Department argued strenuously in favor of the interpretation which it now calls absurd. It took the lead in urging the court below to adopt that interpretation.[1] Having been successful in that effort, and having procured a judgment embodying the interpretation which it sought, the Department now asks this Court to adopt a wholly contrary interpretation and to reverse that judgment.

In the answer filed in this cause on behalf of the United States by the Department of Justice, it was alleged:

> "Defendant denies that said order[2] is invalid for the reasons set forth by plaintiff, or for any reason, and alleges that said order was, as the Commission found, in exact accordance with the Commission's power as delineated and specified in the second sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U. S. C. 5(2)(f)). Defendant alleges that the circumstance that the terminal will not be completed until after 5 years, while the protective period of 4 years will thus have elapsed before the impact upon the employees of the adverse effect resulting from the transactions approved by the Commission, is a circumstance regarding which the employees and carriers are free to make a voluntary agreement pursuant to the last sentence of Section 5(2)(f) of the act but regarding which the Commission has no power under existing law to impose requirements having longer duration than that specified in the second sentence of Section 5(2)(f) of the act." (R. 54).

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[1] The argument by the Department of Justice occupies 15 pages of the transcript, while the argument of counsel for the Interstate Commerce Commission and for the Railroad Intervenors each occupied but 8 pages.

[2] That is, the order under attack in this case.

In its brief in the court below the Department said:

> "It is clear from the face of Section 5(2)(f) that the Commission's construction is correct and that a different construction is not required." (p. 8).
>
> • • •
>
> "The section contains the clear and precise provision that the four-year period shall commence from the effective date of the order of approval. Had Congress intended that the period shall run from the date when the consolidation goes into effect or, as argued by plaintiff, from the date the employees are adversely affected, such words easily could and would have been used by Congress. Nor does the section give to the Commission discretion in applying a period other than four years from the effective date of the order of approval. The terminology in the statute is that the Commission *shall* include the four-year limitation therein provided. To provide a different period in the Commission's order would be contrary to the specific requirement imposed upon the Commission by the statute." (p. 9).

Further:

> "Congress deliberately fixed the period of protection to start from the effective date of the order and not the date an employee is adversely affected." (p. 18).

Finally, the brief concluded:

> "In the light of the clear unambiguous and specific language of Section 5(2) (f), its consistent interpretation and application by the Commission, since its enactment and over a long period of years, and the legislative history of the statute, the order of the Commission herein should not be disturbed." (p. 18).[3]

[3] It is interesting to observe that the answer and brief of the Department in the court below were signed, *inter alios*, by Herbert A. Bergson as counsel for the Department. Mr. Bergson now signs the Department's brief in this Court, which takes direct issue with those documents.

The same views were elaborated in oral argument of the Department. For example, counsel representing the Department argued:

> "It is our position, if the Court please, in this case that the statute in question is not ambiguous, and that the Commission has rendered a proper construction of a plain and unambiguous statute." (Tr. 33).
>
> • • •
>
> "Just assuming that the statute is not clear, and that we refer to the legislative history to see what the legislative intent was and is, when we do that I think without question that that shows that it was the clear intention of the legislature in writing this section of the statute to clearly define and limit the jurisdiction and the powers of the Commission to this specific four-year provision, and the whole legislative history and background, I think without question, clearly shows that." (Tr. 35).
>
> • • •
>
> "If you are going to rewrite the statute and say Congress didn't intend four years from the effective date of the order, that they didn't mean that; that they meant four years from the time the employees lose their jobs if they wanted to stay on, then that would add another four years at least to the statutory provision." (Tr. 44).

And again:

> "The statute is not ambiguous. It doesn't need any construction. In our opinion it is clear and as it is construed the four-year period limits the Commission to that extent.
>
> "But if you will look into the legislative history you are brass-riveted to the proposition that without question it was the intent of Congress that you limit them to that four-year period, and you can't read anything else into that statute." (Tr. 46).

If the Department is correct in its present position, its conduct in the court below can only be considered as entrapment of that court to enter an erroneous decree. We submit that the Department was right the first time.

The reasons advanced in the Department of Justice's brief against the Commission's interpretation of Section 5(2)(f) are, with one exception, the same reasons relied on by the plaintiff in the court below (appellant here). They have been fully dealt with in our main brief and do not require much discussion here. The Department of Justice has now adopted the basic fallacy of appellant's case, namely, that employees are not receiving protection from "being in a worse position with respect to their employment" when they are kept in their jobs at their full pay. Stated in another way, both appellant and the Department seem to think that it was the intent of Congress to give every employee affected by a transaction approved by the Commission under Section 5(2)(f) four years of dismissal or displacement pay. But the statute does not say so; indeed, it does not mention dismissal or displacement pay at all. Instead, it enjoins the Commission to take care that "during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment * * *." Is an employee who keeps his job at full pay for four years "in a worse position with respect to" his employment than if he had been fired at the effective date of the order and had thereafter drawn dismissal pay from the carrier? If the answer to this question is in the negative, and obviously it is, then plainly the only basis of the argument of appellant and the Department of Justice vanishes.

In its brief, the Department does advance one argument of its own in addition to those already made by appellant. This argument is that although Congress legislated in express words that the protective period should run four years from "the effective date" of the Commission's order, it did not really mean this but instead meant from the date an employee is displaced, and that therefore the court should strike the words "effective date" out of the statute

and substitute in their place the words "date an employee is displaced". The brief says:

> "The failure of Congress to anticipate the present contingency, and thus to use language which adequately dealt with it, does not prevent the Court from giving the words of the four-year clause the meaning which Congress obviously intended them to have." (p. 8).

The Department thus ascribes to Congress an intent different from the one which it expressed in clear words and asks this Court to legislate this supposed intent into the statute in substitution for the plain words of the statute. We do not believe that this Court will thus rewrite an act of Congress as now sought by the Department.

It is respectfully submitted that the interpretation of the statute made by the Interstate Commerce Commission, by the court below, and by the Department of Justice in the court below, is the correct one and that the interpretation urged in this Court by the Department contrary to the one it so strenuously insisted upon in the court below, is wholly incorrect.

Respectfully submitted,

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PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 337.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Columbia.

PETITION FOR REHEARING.

Come now the appellees Interstate Commerce Commission and the Railroad Intervenors, the City of New Orleans, Louisiana, the Chicago, St. Louis and New Orleans Railroad Company, the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana and Arkansas Railway Company, the Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Texas and New Orleans Railroad

Company, The Texas and Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof respectfully show:

The full Court should be given an opportunity to examine the record in this case and determine the meaning of Section 5(2)(f) of the Interstate Commerce Act, since the seven Justices participating at the first hearing have sharply divided on the question of whether resort to the legislative history is warranted to determine the intent of Congress in the face of the specific and clear language used, and especially when the controlling opinion of only four members of the Court (three Justices dissenting) overlooks important and convincing parts of the legislative history which show that Congress intended to specify a fixed and definite period of time for the duration of the fair and equitable arrangement contemplated in the case of railroad consolidations.

1. THE COURT IN-ITS FOUR TO THREE DECISION HAS DEPARTED FROM THE WELL-SETTLED DOCTRINE THAT LEGISLATIVE HISTORY WILL NOT BE RESORTED TO WHEN THE LANGUAGE OF A STATUTE IS CLEAR AND UNAMBIGUOUS; THE FULL COURT SHOULD THEREFORE REHEAR THE CASE AND DECIDE IF THE CONTROLLING OPINION OF THE MINORITY OF THE FULL COURT IS CORRECT.

The position of the Interstate Commerce Commission and the Intervening Railroads[1] is that the plain language

[1] The answer of the United States, the oral argument and the brief in the Court below on behalf of the United States are also in full accord with and in support of the order of the Interstate Commerce Commission (See R. Bf. 1-6). The controlling opinion of this Court, however, gives consideration to the Department of Justice's brief filed here which is at variance with the answer of the United States (R. 53), and contrary to its position below.

of Section 5(2)(f) of the Interstate Commerce Act is clear and unambiguous and can be interpreted only to mean that the Commission must prescribe a fair and equitable arrangement measured by the specification therein of a protective period of four years from the effective date of the order of approval of a transaction within the scope of the statute (I. C. C. Bf. 18-32; Bf. 5-12).[2] This interpretation of the statute was followed by the Commission in the first case which arose shortly after the passage of the statute, and has been consistently followed for a period of almost ten years (I. C. C. Bf. 42-44). The statute was succinctly analyzed and clearly explained in accord with this position in the unanimous opinion of the three-judge district court below as follows:

> "In our view the language of the statute in question is clear and unambiguous and the Commission's interpretation is correct. The first sentence thereof provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence prescribes the standard for such arrangements, namely that they shall be such that the employees will not be placed in a worse position with respect to their employment, and then proceeds to limit the time of such protection, namely four years from the effective date of the approval order. In addition, this interpretation is in accordance with the Commission's prior construction of the statute, and on that account is entitled to great weight. Finally, the legislative history set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute." (R. 71-2)

[2] The following abbreviations are used for convenience throughout this petition:

Bf.—Main brief of Railroad Intervenors
R. Bf.—Reply brief of Railroad Intervenors
I. C. C. Bf.—Brief of Interstate Commerce Commission
D. J. Bf.—Brief of Department of Justice
App. Bf.—Brief of Appellant
R.—Transcript of Record

In the controlling opinion of March 27, 1950, this Court did not find any ambiguity in the language of the statute, but nevertheless proceeded to examine fragments of the legislative history as a basis for reading into the statute by interpretation a meaning not expressed by the plain words used by Congress. This approach led the Court into a result that has the effect of encroaching on the legislative powers of Congress, which the Court has always heretofore carefully avoided and recently stated was improper in the case of *Federal Power Commission* v. *East Ohio Gas Company*, 338 U. S. 464, 474, as follows:

> "We find no language in the Act indicating that Congress meant to create an exception for every company transporting interstate gas in only one state. Regardless of whether it might have been wiser and more farseeing statesmanship for Congress to have made such an exception, we should not do so through the interpretative process. There is nothing in the legislative history which authorizes us to interpret away the plain congressional mandate."

Mr. Justice Jackson in dissenting recognized that the instant case was not a proper one for resort to the legislative history to vary the terms of the statute, as also did Mr. Justice Frankfurter and Mr. Justice Reed, who, in a dissenting opinion, quoted with approval the strong and forceful language used by the Government in the court below in support of the Interstate Commerce Commission, as follows:

> "The section contains the clear and precise provision that the four-year period shall commence from the effective date of the order of approval. Had Congress intended that the period shall run from the date when the consolidation goes into effect or, as argued by plaintiff, from the date the employees are adversely affected, such words easily could and would have been used by Congress. Nor does the section give to the Commission discretion in applying a period other than four years from the effective date of the order of approval. The terminology in the statute is that the

Commission *shall* include the four-year limitation therein provided. To provide a different period in the Commission's order would be contrary to the specific requirement imposed upon the Commission by the statute.

* * * * * * * * *

"Congress deliberately fixed the period of protection to start from the effective date of the order and not the date an employee is adversely affected.

* * * * * * * * *

"In the light of the clear unambiguous and specific language of Section 5(2)(f), its consistent interpretation and application by the Commission, since its enactment and over a long period of years, and the legislative history of the statute, the order of the Commission herein should not be disturbed."

As the Court has by the first opinion in this case inadvertently erred in resorting to the legislative history, and by the resulting decision of a minority of the full Court encroached on the functions of Congress, it is submitted that the two members of the Court who were absent at the argument and did not participate in the decision should have the opportunity to join with the Court in rehearing this case so that the opinion and decision may be corrected and a decision be rendered by a clear majority of the full Court.

2. THE CONTROLLING OPINION OF ONLY FOUR MEMBERS OF THE COURT OVERLOOKS IMPORTANT AND CONVINCING PARTS OF THE LEGISLATIVE HISTORY WHICH SUPPORT THE JUDGMENT OF THE LOWER COURT AND SHOW CONVINCINGLY THAT THE COMMISSION'S INTERPRETATION OF THE STATUTE IS IN ACCORD WITH CONGRESSIONAL INTENT.

Although it is unnecessary, in our opinion, to resort to the legislative history in view of the plain and unambiguous language of the statute, the legislative history is reviewed in the Railroad Intervenors' brief (Bf. 13-22) for the purpose of showing that it corroborates the plain meaning of the statute and the interpretation reached by the

Commission and the court below. See *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278. Likewise, the brief of the United States filed in the court below the Commission's brief (I. C. C. Bf. 32-42) show that the compromise reached by the second conference committee was for the very purpose of fixing a definite mandatory protective period for the duration of the fair and equitable arrangement to be prescribed by the Commission pursuant to Section 5(2)(f).

The controlling opinion, however, contents itself with a review of the background leading up to the legislation which merely shows that the Congress desired to make some sort of mandatory requirement for the protection of the employees to be adversely affected in the case of railroad consolidations. As the opinion shows, there was a disagreement between the Senate and the House over the duration of the required arrangement. The Senate would have left the period of protection entirely up to the discretion of the Commission, while the House would have required complete protection against any adverse affect for an unlimited time. The opinion then points out that the House version was recognized as being impracticable as it would have prevented all consolidations. (See in this connection the Commission's recommendation against the House version (App. Bf. 40), as well as the objections of Chairman Lea describing the House version as fantastic (86 Cong. Rec. App. 2865, I. C. C. Bf. 33).) The opinion concludes its consideration of the legislative history by merely stating that the second conference committee reported Section 5(2)(f) in the final form in which it was enacted into law. Instead of examining the committee report and the legislative debates thereon to determine the meaning of the statute, the opinion proceeds to make an interpretation of the statute only in the light of the background down to the beginning of the debates, thus overlooking the vital and most important part of the history which, for the first time, revealed the final, considered intent and purpose of the conference committee and the Congress.

This vital part of the legislative history is discussed in the briefs in considerable detail (Bf. 17-22, I. C. C. Bf. 37-42), and by overlooking it the Court has inadvertently failed to give full consideration to the position of the Commission and the Railroad Intervenors. Indeed, it is not without significance that the Court also overlooked the fact that the Department of Justice has admitted that there "may be some room for conflicting interpretations of the debate," (D. J. Bf. 18).

Representative Lea, Chairman in charge, in discussing the Second Conference Report, made it abundantly clear that the statute was to be read as a whole and that the four year period was prescribed for the purpose of definitely fixing the duration of the protective arrangement (Bf. 17-19). In the debate that followed, Chairman Lea and Representative Wolverton, also a member of the conference committee, in response to questions, reiterated that the fundamental purpose of the statute was to give employees "protection against sudden and long unemployment" by specifically fixing the time for the running of the benefits from the effective date of the Commission's order rather than some other date (Bf. 18-19). Finally, the controlling opinion of the Court completely overlooks the fact that one of the most active proponents of this legislation, President A. F. Whitney of the Brotherhood of Railroad Trainmen, agreed in his report on the legislation, quoted in part at page 20 of the Railroad Intervenors' brief, that the first two sentences of the statute should be read together as providing one protective arrangement limited to a four year period beginning with the effective date of the Commission's order.

In connection with the legislative history it is also to be noted that the controlling opinion indicates that discrimination would result if the Commission is prohibited from applying its full discretion to employees displaced by consolidations, at the same time it is authorized to apply its full discretion to those displaced by abandonments (See

note 16 of the opinion). But Congress specifically rejected an attempt to extend Section 5(2)(f) to abandonment cases under Section 1 (18) to (20) of the Interstate Commerce Act, as pointed out in the opinion at page 10; and, as a matter of fact, the Commission has never prescribed, since the passage of Section 5(2)(f), a protective arrangement extending beyond a period of four years from the effective date of an order entered pursuant to Section 1 (18) to (20), and in many such cases has required no protection whatsoever.[3] Moreover, there is nothing in the record or the briefs to show any discrimination resulting in the case of such employees, if any, who might be affected by the abandonments involved in the New Orleans transaction as compared with those who will be affected by the consolidation features. On the contrary, as shown in the Railroad Intervenors' brief (Bf. 22-28), discrimination would necessarily follow if the Commission had adopted the interpretations sought by the appellant.

In the light of all these circumstances, it is submitted that the full Court should review the legislative history again, if it be determined that the legislative history is pertinent in this case, in order to give full consideration to all of its aspects, and particularly those parts showing the intent of Congress in adopting the language recommended by the Second Conference Committee.

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[3] In a few cases prior to 1940, the Commission did prescribe conditions comparable to the Washington Job Protection Agreement, which agreement provided for benefits limited to 60% of prior earnings for periods varying from 6 months to 5 years depending upon the length of prior service of the employees. The maximum benefit under this provision—60% for 5 years—was equivalent to 3 years at full earnings. Since 1940, the Commission has customarily prescribed a maximum of 4 years at full earnings. See in this connection *United States* v. *Lowden*, 308 U. S. 225, and *I. C. C.* v. *Railway Labor Executives' Assn.*, 315 U. S. 373, and the discussion in the Commission's brief at pages 23 to 32.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

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HENRY B. CURTIS,
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CERTIFICATE OF COUNSEL.

We, Daniel W. Knowlton, Chief Counsel of the Interstate Commerce Commission, and W. S. Macgill, counsel for the above-named Railroad Intervenors, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

W. S. MACGILL,
Counsel for Railroad Intervenors.

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Appeal from the United States District Court for the District of Columbia

REPLY TO PETITION FOR REHEARING

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REPLY TO PETITION FOR REHEARING

Comes now the appellant, Railway Labor Executives' Association, and for its response to the Petition for Rehearing filed in the cause on April 10, 1950, respectfully says that the Petition is without merit and should be denied for the following reasons:

Petitioner argues that the Court, by proceeding to examine "fragments" of the legislative history of Section

5(2)(f) of the Interstate Commerce Act, has read into the statute a meaning not expressed by its plain language and has thereby encroached on the legislative powers of Congress. We submit that on the contrary the Court has interpreted the statute completely consistent with its "plain language" and in the only way in which its basic purpose can be heeded. When properly read, the opinion of the Court is perfectly clear on this proposition, and only a brief statement is required to answer the inaccurate and misleading interpretation of that opinion which is advanced in the petition for rehearing.

In the first place, the argument between appellant and the appellees has never been the usual one of dispute over the meaning of certain words in a statute which require resolution by resort to legislative history. The dispute between appellant and the appellees has been one of whether to give full force and effect to the plain language of not only the second but also the first sentence of Section 5(2)(f).

The language of the first sentence standing alone clearly requires the Commission to provide a fair and equitable arrangement for all employees adversely affected as a result of coordination transactions approved by the Commission. The second sentence then goes on to state a particular type of protection which the Commission must "include" in its order and then proceeds to limit the period of time in which that particular protection shall be required. But to conclude, as the railroad intervenors and the Commission do, that such time limitation is a limitation on the section as a whole, rather than on the provision of the second sentence in which it is found, not only violates the very language of the second sentence itself[1] but in reality reads the first sentence out of the statute and nullifies it com-

[1] As pointed out in the Court's opinion (p. 11 of slip copy), the proviso of the second sentence, which contains the time limitation, clearly limits its applicability to the second "sentence" rather than to the section as a whole.

pletely as though it did not exist. Actually, the very most that could ever be claimed for appellees' position is that the first sentence does not mean what it says because the second sentence nullifies its terms by providing a limitation inconsistent therewith. It was only by virtue of such a contention by the railroads, which was adopted by the Commission in the proceeding before it, that resort to legislative history became necessary in order to determine whether Congress intended to circumscribe the plain language of one sentence or provision by the language of another.

The opinion of this Court clearly and convincingly shows that such was not the intention of Congress. What petitioners slightingly refer to as "fragments of the legislative history", is rather a most painstaking review of the legislation from its inception to its conclusion, with the end result of establishing that at no time did Congress intend to undo with one hand what it had secured with the other.

This Court has uniformly recognized in many cases the propriety of giving effect to the basic purpose of legislation. Indeed, the Court has declared that even where the language of a statute is plain and unambiguous it would not be followed if to do so led to an unreasonable result plainly at variance with the basic legislative purpose. *American Trucking Assn.* v. *United States*, 310 U. S. 534, 543.

The basic purpose of Section 5(2)(f) undeniably was to give railroad workers dismissed and displaced as a result of carrier consolidation and coordination transactions a measure of protection through compensatory benefits for a reasonable period during which they could economically readjust themselves. The Commission's decision in this case did not do this. To say, as petitioners do, that Congress intended to protect only the few employees who might be dismissed prior to the completion of the terminal construction project at New Orleans, and to ignore the rest, is to fly in the face of the plain language of the first sentence of Section 5(2)(f) and its intent which was carefully explained at

the inception of the legislation and was never departed from up to and including the statements by the House conferees immediately prior to its passage by the Congress.

It is simply a patent inaccuracy for petitioners to state that the Court's opinion "contents itself with a review of the background leading up to the legislation" and overlooks and fails to examine or give consideration to "the committee report and legislative debate thereon to determine the meaning of the statute".[2] The exact converse is the fact. Not only does the Court carefully trace the history of the first and second sentences throughout the House proceedings,[3] where all the "vital and most important" comments referred to by petitioners occurred, but it pointedly calls attention to the remarks of Congressmen Lea and Wolverton (the two House conferees in charge of the bill and primarily responsible for the actual drafting of the provisions in question) which explained the purpose and the meaning of the several provisions immediately preceding passage of the legislation.[4]

Included in these specific references of the Court are two particularly significant statements. The first was made by Congressman Lea, Chairman of the House conferees. He pointed out that the legislation as finally agreed upon contained certain specific provisions that were required to be in the Commission's order but that "otherwise we do not tie its hands."[5] Such an observation could only refer to the discretion granted the Commission by the first sentence of the section, which the railroad intervenors and the Commission contend is tied by the time limitation of the second sentence.

The second significant statement, which further clarifies the previous statement of Congressman Lea, was made by

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[2] Petition, p. 6.

[3] Slip opinion, pp. 8-11.

[4] *Id.* at p. 10, note 16.

[5] See Appellants' brief to this Court, p. 50.

Representative Wolverton. In explaining the intent of the second conference committee which drafted the language which now appears in Section 5(2)(f), he first pointed out that the Harrington amendment, or second sentence of the section, "was not in the Senate bill in any form whatsoever". He then went on to explain the purpose of the first sentence, which was the Senate version of what was desired as well as the original House proposal, as one designed to assure at least a continuance of the Washington Agreement but also so phrased as to "not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future".[6]

Accordingly, there is not only lack of merit in the position urged by petitioners but a wholly inaccurate description of the content of the Court's opinion. Since the stated purpose of the petition for rehearing is to enable the Court to give consideration to all of the aspects of the legislative history and "particularly those parts showing the intent of Congress in adopting the language recommended by the Second Conference Committee"[7]—something which the Court has already done as shown above—the petition obviously is lacking in substance and should be denied.

Petitioners entirely miss the significance of the Court's observation that if the Commission's interpretation of Section 5(2)(f) were upheld in this case it would mean that protection which is undeniably available under the non-mandatory provisions of the abandonment section of the Interstate Commerce Act is now denied by legislation which made the imposition of an equitable arrangement for the protection of employees mandatory.[8] That such an inconsistency of statutory purpose is not to be lightly ascribed to Congress is hardly answered by petitioners' statement

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[6] *Id.* at pp. 50-51.

[7] Petition, p. 8.

[8] Slip opinion, pp. 10-11, note 16.

that "Congress specifically rejected an attempt to extend Section 5(2)(f) to abandonment cases under Section 1(18) to (20) of the Interstate Commerce Act."[9] The fact that Congress did so is of course addressed only to the requirement of protection, not its permissible nature or extent, as was made clear by this Court's decision in *Interstate Commerce Commission* v. *Railway Labor Executives' Assn.*, 315 U. S. 373.

Finally, no attempt is made by petitioners to meet one of the most vital defects in the Commission's interpretation of the statute—its inconsistency with this Court's previous decisions in *United States* v. *Lowden*, 308 U. S. 225, and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373.[10]

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

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[9] Petition, p. 8.
[10] Slip opinion, p. 12.